THE OFFICES OF THE INFORMATION AND PRIVACY COMMISSIONERS: THE MERGER AND RELATED ISSUES

Report of the Special Advisor to the Minister of Justice

Gérard V. La Forest

November 15, 2005

November 15, 2005

Delivered By Hand

The Hon. Irwin Cotler
Attorney General of Canada
Wellington Street
Ottawa, Ontario K1A 0A6

Dear Sir:

I am pleased to present you with my report concerning the desirability of merging the offices of the Information Commissioner and the Privacy Commissioner and the related issues referred to in the Terms of Reference. I am gratified that the Prime Minister and yourself chose me to undertake an examination of an issue that has continued to arise in respect of these two offices from their inception. I am hopeful that the report will be helpful to you in considering the matter.

I derive considerable satisfaction from the fact that I was able to complete the Report within the time frame set forth in the Terms of Reference. This would not have been possible without the timely assistance of both commissioners and a number of the provincial commissioners, and former commissioners at both levels of government, as well as a number of other interested individuals and organizations, all of whom are listed in the Appendix to the report. To all of them I am most grateful for their cooperation and I thank them for it.

Closer to home I would be remiss if I did not acknowledge the outstanding work done by Professor Steven Penney of the Faculty of Law of the University of New Brunswick, who assisted me in conducting the necessary research and in writing the report, and my Legal Assistant, Shyanne MacLaggan whose administrative skills were a constant source of support.

Finally I am grateful to members of your Department who, at the request of the Deputy Minister John Sims, assisted me with the logistical tasks associated with the review, particularly, Ms. Mimi LePage who acted in a liaison capacity.

Yours sincerely,

Gérard V. La Forest

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The Mandate

On July 22, 2005, Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, appointed me to the position of Special Advisor to the Minister of Justice, the Honourable Irwin Cotler.[1] The Terms of Reference of the appointment are as follows:

> To prepare, for the consideration of the Minister of Justice, a report assessing the challenges of the current model, reviewing models used in other jurisdictions, and developing options for the Government's consideration.
>
> In particular, the report is to include an assessment of the merits of fully merging the offices of the Information Commissioner and the Privacy Commissioner into a single office as has been done in numerous provincial jurisdictions, as well as an assessment of the merits of cross-appointing a single Commissioner to both functions while maintaining two separate Commissions.
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> In conducting the analysis, the reviewer should consider whether either a merger or cross-appointment would have an impact on the policy aims of the Access to Information Act, the Privacy Act or the Personal Information Protection and Electronic Documents Act, and to advise on how best any such impacts might be effectively avoided.
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> The reviewer's findings and recommendations are to be submitted to the Minister by November 15, 2005.

My primary task, as I understand it, is to provide independent advice to the Minister with respect to the matter described in the second paragraph of the Terms of Reference; that is, to assess the merits of combining the functions of the Information Commissioner and the Privacy Commissioner, either through a full merger of the commissioners' offices or the cross-appointment of a single commissioner to both positions. As discussed in greater detail below, the question of merging the two offices has been mooted repeatedly since 1982, when the *Access to Information Act* and the *Privacy Act* were brought forward together to Parliament as a part of a single Bill. During this period, a number of parties, including both governments and commissioners, have proposed merging the

[1] See *Special Appointment Regulations, No. 2005-7*, P.C. 2005-1352 (22 July, 2005).

offices. The latest proposal was issued by the current Information Commissioner, John Reid, in 2003 (he has since repudiated this proposal).

To date, however, no one either in or outside government has undertaken a comprehensive, public review of the advantages and disadvantages of such a merger. It must be stressed that in the limited time available to conduct this review, it was not possible to pursue the kind of detailed independent research that was completed, for example, by the Task Force that recently reviewed the operation of the *Access to Information Act*.[2] I am confident, nonetheless, that my findings and recommendations on the questions of merger and cross-appointment, which are set out in Part II of this Report, are based on a well-informed and sound assessment of the merits and demerits of these alternatives.

In addition to the specific issues of merger and cross-appointment, the Terms of Reference instruct me to assess the "challenges of the current model," review "models used in other jurisdictions," and develop "options for the Government's consideration." I have dealt with this aspect of my mandate in two ways. First, to the extent that these tasks bear on the immediate questions of merger and cross-appointment, I have incorporated them into my analyses of those questions. Second, in Part III of this Report I have described some of the key challenges facing the existing models for promoting and protecting two inter-related rights of major importance to our polity: the right of the public to access information in the control of the government and the right to privacy in relation to personal information contained in government records.

In the process of conducting this review, it became clear to me that the most critical challenges facing the offices of the Information and Privacy Commissioners – such as the culture of secrecy inhering in the federal bureaucracy, the need for better information management systems in government, and the increasing threats to Canadians' privacy posed by rapid technological and social change – have little to do with the question of merging the offices. Given the limited time allocated for this review, I cannot hope in this Report to analyse these challenges in detail or to provide firm recommendations on how they should be met. What I can do is highlight some of the challenges that should be

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[2] See Access to Information Review Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Public Works and Government Services, 2002) (Andreé Delagrave, Chair) ("Delagrave Report").

considered in the process of reforming the existing access to information and privacy regimes, whether or not a merger is pursued.

The Process

The analyses and recommendations in this Report are based on two types of information. I relied, first, on the usual litany of documentary evidence, including relevant federal, provincial, and comparative legislation, academic writing, government and commission reports, cabinet documents, and newspaper articles. Secondly, I solicited input from a variety of parties interested in the work of the two offices. To that end I conducted a series of interviews and meetings, both in person and over the telephone, with the current federal Information and Privacy Commissioners (including senior members of their staffs), a number of former federal commissioners, and several provincial commissioners. These individuals provided me with invaluable insights into the workings of the federal and provincial access to information and privacy systems. Many of them also supplied me with written submissions and background materials relevant to the review. I am extremely grateful for the assistance that these persons provided. I also conducted meetings with and solicited submissions from a variety of academics, practitioners, and public interest organizations. Their input was also exceptionally valuable and I thank them for their participation. Of necessity, many of these consultations were organized on short notice. The quality of submissions was nonetheless high, and I am especially thankful to the participants for contributing to this review in a timely fashion.[3]

Despite the limited time at my disposal, I am satisfied that I was able to get a good cross-section of the views of interested parties. It should be noted, however, that with limited exceptions, I did not consult with officials from the federal government.[4] This is an important omission, and it should be kept in mind

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[3] A list of the individuals and organizations I consulted is included as an Appendix to this Report.

[4] The exceptions consisted of a single, brief meeting with the Deputy Minister of Justice, John Sims, and various officials from his department to discuss logistical matters related to the review, and a meeting with Andreé Delagrave, who is currently an Assistant Deputy Minister in Library and Archives Canada. Ms. Delagrave was the principal author of the Access to Information Review Task Force, which undertook a comprehensive review of the federal access to information process in 2002. Her input was thus particularly valuable to me in preparing this Report.

in reviewing the conclusions set out in this Report. I felt, however, that it was necessary to ensure that the review was conducted in a thoroughly independent manner.

Though it is in some sense an obvious point, it must be stressed that my conclusions are not binding on the Minister, and I do not have the effrontery to think that they will necessarily commend themselves either to the Government or Parliament. My hope is that the Report will have the merit of more clearly identifying and clarifying the factors that must be weighed in making decisions on merger and related issues than had been the case before my work began.

PART I: BACKGROUND

In this Part of the Report, I set out the background information necessary for an analysis of the questions raised in the Terms of Reference. I review the history and purposes of the relevant legislation, detail the functions of the federal Information and Privacy Commissioners, relate the history of previous merger proposals, and describe the access to information and privacy regimes in the provinces, territories, and selected international jurisdictions.

The History and Purposes of Federal Access to Information and Privacy Legislation

From their beginnings to the post-World War II period, governments at both the federal and provincial levels functioned without any general law permitting access to information in their possession or restricting the collection, use, and disclosure of matters contained in such information that could affect the privacy of individuals. With the vast expansion in government and the consequent growth of the amount of information it collected, it came to be perceived both that access to such information was required to ensure democratic and accountable government, and that information collected by government about individuals should be treated as confidential. By the late 1960's, some of the provinces had already taken steps in that direction. The federal government began to engage in studies on both fronts in the early 1970's, but it was not until the early 1980's that comprehensive legislation addressing both issues was introduced.[5] The Bill, which contained both the present *Access to Information Act* and the *Privacy Act*, came into force on July 1, 1983. The *Access to Information Act* gives individuals a right of access to government information.[6] The *Privacy Act* permits them to gain

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[5] In 1977 Parliament enacted the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, which provided some protection for the privacy of personal information held by government and established the Privacy Commissioner as a member of the Canadian Human Rights Commission. These provisions were repealed in 1983 with the introduction of the *Privacy Act*.

[6] Section 2(1) of the *Access to Information Act* states that the statute's purpose "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." Subsection (1) states that the "Act is intended to complement and not replace existing procedures for access to government

access to information about themselves held in government data banks, and limits government's ability to collect, use, and disclose such information.[7]

The rights protected by both Acts are of the highest importance in the functioning of a modern democratic state. The right of access promotes accountability by government to the public and enables the latter to participate more meaningfully in the political process. It also serves the function of providing access to the extensive storehouse of information about our society in the possession of government. The recent Report of the Access to Information Review Task Force says it well:

> The rationale for access to information legislation was recognized in the Government's 1977 Green Paper on public access to government documents which concluded that:
>
> > • effective accountability – the public's judgment of choices taken by government – depends on knowing the information and options available to the decision-makers;
> >
> > • government documents often contain information vital to the effective participation of citizens and organizations in government decision-making; and
> >
> > • government has become the single most important storehouse of information about our society, information that is developed at public expense so should be publicly available wherever possible.

So important is the right to government information that some have come to refer to it as "quasi-constitutional" in nature.[8] This properly underlines the

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information and is not intended to limit in any way access to the type of government information that is normally available to the general public."

[7] Section 2 of the *Privacy Act* states that the statute's purpose "is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information."

[8] See *Nautical Data International Inc. v. Canada (Minister of Fisheries and Oceans)*, 2005 FC 407 at para. 8; *Canada (Attorney General) v. Canada (Information Commissioner)*, [2004] 4 F.C.R. 181 at para. 20, 255 F.T.R. 56, 15 Admin. L.R. (4th) 58, 32 C.P.R. (4th) 464, 117 C.R.R. (2d) 85, 2004 FC 431, rev'd (2005), 253 D.L.R. (4th) 590,

importance of the right. However, Parliament has made it clear that the right of access must cede to other interests in certain circumstances. As discussed in more detail below, the protection of the privacy of personal information constitutes one of the most important exceptions to the right of access.

The courts have also described the *Privacy Act* as carrying a "quasi-constitutional mission."[9] In a number of respects, however, privacy has also been recognized internationally as a human right and in Canada as a constitutional right. The *Universal Declaration of Human Rights* refers to privacy in the following terms:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.[10]

In Canada, privacy is a constitutional right both by virtue of the "liberty interest" in section 7 and the prohibition against unreasonable search and seizure set forth in section 8 of the *Canadian Charter of Rights and Freedoms*.[11] As early as 1984, the Supreme Court of Canada in *Hunter v. Southam* declared that the individual under section 8 has a constitutional right to a reasonable expectation of privacy.[12]

A few years later, in *R. v. Dyment*, the Court described privacy as an essential component of individual freedom. It thus put the matter:

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335 N.R. 8, 40 C.P.R. (4th) 97, 2005 FCA 199, leave to appeal to S.C.C. requested; *Canada (Attorney General) v. Canada (Information Commissioner)*, [2002] 3 F.C. 630 at para. 20, 216 F.T.R. 247, 41 Admin. L.R. (3d) 237, 2002 FCT 128; *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421 at para. 102, (2001), 282 N.R. 284, 45 Admin. L.R. (3d) 182, (2001) 14 C.P.R. (4th) 449, 2001 FCA 254, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 537 (Q.L.).

9 *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773 at paras. 24-25.

10 Art. 12, GA Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

11 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

12 See *Hunter v. Southam*, [1984] 2 S.C.R. 148 at 159-60.

> Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.[13]

The Court in the latter case went on to explain that there are several aspects or zones of privacy, notably those relating to one's person, those having a spatial aspect (*e.g.* security of the home), and those relating to information, the aspect with which we are concerned here.[14] No one, of course, denies that modern governments have valid reasons to collect information about individuals for a wide variety of matters in the public interest. The Supreme Court has made it clear, however, that such information is in a fundamental way that of the individual and must remain confidential and restricted to the purposes for which it was divulged. It thus put the matter in *Dyment*:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*, S.C. 1980-81-82-83, c. 111.[15]

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13 *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427-28.

14 *Supra* note 11 at 428-30.

15 *Ibid,* at 429-30. The Task Force referred to was created in the early 1970's to examine the relationship between privacy and computers. See Task Force on Privacy and Computers, *Privacy and Computers: a Report of a Task Force Established Jointly by Dept. of Communications/Dept. of Justice* (Ottawa: Information Canada, 1972).

With this broad context in mind, we can turn to the question of how the rights set out in the *Access to Information Act* and the *Privacy Act* interact with one another. As stated, privacy is an exception to the right of access under the *Access to Information Act*. As the Supreme Court concluded in *Dagg v. Canada (Minister of Finance)*:

> Both statutes regulate the disclosure of personal information to third parties. Section 4(1) of the *Access to Information Act* states that the right to government information is "[s]ubject to this Act". Section 19(1) of the *Act* prohibits the disclosure of a record that contains personal information "as defined in section 3 of the *Privacy Act*". Section 8 of the *Privacy Act* contains a parallel prohibition, forbidding the non-consensual release of personal information except in certain specified circumstances. Personal information is thus specifically exempted from the general rule of disclosure. Both statutes recognize that, in so far as it is encompassed by the definition of "personal information" in s. 3 of the *Privacy Act*, privacy is paramount over access.[16]

This interpretive framework was reiterated by the Court in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)* as follows:

> Further, I note that s. 4(1) of the *Access Act* states that the right to government information is "[s]ubject to this Act". Section 19(1) of the *Access Act* expressly prohibits the disclosure of a record that contains personal information "as defined in section 3 of the *Privacy Act*". Thus, s. 19(1) excludes "personal information", as defined in the *Privacy Act*, from the general access rule. The *Access Act* and the *Privacy Act* are a seamless code with complementary provisions that can and should be interpreted harmoniously.[17]

Most recently, the scope of privacy protection in Canada has been substantially enlarged by the passage of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA").[18] Spurred on by legislative developments

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16 [1997] 2 S.C.R. 403 at para. 48.

17 [2003] 1 S.C.R. 1 at para. 22.

18 S.C. 2000, c. 5. The first portions of the Act to come into force did so on January 1, 2001. The Act came into force fully on January 1, 2004. See generally Christopher Berzins, "Protecting Personal Information in Canada's Private Sector: The Price of Consensus Building" (2002), 27 Queen's L.J. 609.

in the European Union[19] and the province of Quebec,[20] as well as the work of the Canadian Standards Association,[21] Parliament enacted PIPEDA in 2000 to protect personal information collected, used or disclosed by private sector entities.[22]

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19 In 1995, the European Union issued its Directive on Data Protection: EC, Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] O.J. L. 281/31 ("Directive"). The Directive obliged European Union member states to pass private sector data protection legislation, including provisions restricting the transmission of personal information to non-EU jurisdictions lacking comparable privacy safeguards. The Commission of the European Communities has since declared that with the passage of PIPEDA, Canada is considered to provide "an adequate level of protection for personal information transferred from the Community to recipients subject to [PIPEDA]." See Commission of the European Communities, "Commission Decision of 20 December 2001 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act," 2002/2/EC, [2002] O.J. L. 002, 04/01/2002, pp. 0013-0016.

20 In 1994, Quebec became the first jurisdiction in Canada to adopt private sector privacy legislation. See *Act respecting the protection of personal information in the private sector*, R.S.Q., c. P-39.1. See generally Privacy Commissioner of Canada, *Learning from a Decade of Experience: Quebec's Private Sector Privacy Act* (Ottawa: Privacy Commissioner of Canada, 2005) (Karl Delwaide and Antoine Aylwin, authors).

21 PIPEDA explicitly incorporates, with some modifications, the Canadian Standards Association's *Model Code for the Protection of Personal Information*, which was first promulgated in 1996 as a voluntary industry standard. See Barbara McIsaac, Rick Shields, and Kris Klein, *The Law of Privacy in Canada* (Scarborough, Ont: Thomson Carswell, 2004), § 4.1.6.

22 Section 3 of PIPEDA states that the statute's purpose is "to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances." PIPEDA applies to private sector organizations dealing with personal information in the course of commercial activity as well as to the personal information of employees of federally regulated enterprises. See PIPEDA, s. 4(1). Section 26(2)(*b*) authorizes the Governor in Council (Cabinet) to declare provincial privacy legislation to be "substantially similar" to Part I of PIPEDA and thereby exempt the intra-provincial activities of provincially regulated entities from PIPEDA's purview. To date, such declarations have been issued with respect to legislation in Quebec, Alberta, and British Columbia. See *Organizations in the Province of Quebec Exemption Order*, P.C. 2003-1842, SOR/2003-374 (19 November 2003); *Organizations in the*

PIPEDA sets out a list of principles, sometimes referred to as "fair information practices," that organizations subject to the Act must adhere to, subject to certain exceptions.[23] Generally speaking, those organizations must obtain the consent of individuals from whom they have collected personal information, and must limit their use of that information to the purposes for which consent was given. As advances in information technology cause more and more personal information to be collected and shared by private organizations, PIPEDA and its provincial counterparts will become increasingly important tools in safeguarding Canadians' personal information against misuse by profit-motivated organizations and ensuring that those organizations are able to compete in the marketplace on a level playing field.

The Functions of the Federal Information and Privacy Commissioners

The offices of the Information Commissioner and Privacy Commissioner were created in 1983 with the passage of the *Access to Information Act* and the *Privacy Act*, respectively. As the Supreme Court of Canada observed in *Lavigne*, the mandates of the commissioners are "in many significant respects . . . in the nature of an ombudsman's role."[24] The Court described the nature of that role as follows:

> An ombudsman is not counsel for the complainant. His or her duty is to examine both sides of the dispute, assess the harm that has been done and recommend ways of remedying it. The ombudsman's preferred methods are discussion and settlement by mutual agreement. As Dickson J. wrote in *British Columbia*

Province of Alberta Exemption Order, P.C. 2004-1163, SOR/2004-219 (12 October, 2004); *Organizations in the Province of British Columbia Exemption Order* P.C. 2004-1164, SOR/2004-220 (12 October, 2004).

[23] See PIPEDA, Schedule 1. Note that pursuant to s. 5 of the Act, some of the principles set out in the Schedule are not mandatory (*i.e.* those prefaced with the word "should"). The exceptions to the principles are set out in ss. 6-9 of the Act.

[24] *Supra* note 9 at para. 37. In that case, the Court was specifically referring to the Privacy Commissioner and the Official Languages Commissioner. The statutory framework for the Information Commissioner, however, is essentially the same. As discussed below, in recent years the Privacy Commissioner has also become responsible for overseeing the implementation of PIPEDA, the federal private sector privacy statute. Though the powers associated with this role are similar to the ombudsman-type powers exercised by the Commissioner under the *Privacy Act*, ombudsmen have not traditionally been responsible for supervising non-governmental activity.

Development Corp. v. Friedmann, [1984] 2 S.C.R. 447, the office of ombudsman and the grievance resolution procedure, which are neither legal nor political in a strict sense, are of Swedish origin, circa 1809. He described their genesis (at pp. 458-59):

> As originally conceived, the Swedish Ombudsman was to be the Parliament's overseer of the administration, but over time the character of the institution gradually changed. Eventually, the Ombudsman's main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved.
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> The institution of Ombudsman has grown since its creation. It has been adopted in many jurisdictions around the world in response to what R. Gregory and P. Hutchesson in *The Parliamentary Ombudsman* (1975) refer to, at p. 15, as "one of the dilemmas of our times" namely, that "(i)n the modern state . . . democratic action is possible only through the instrumentality of bureaucratic organization; yet bureaucratic power – if it is not properly controlled – is itself destructive of democracy and its values."
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> The factors which have led to the rise of the institution of Ombudsman are well-known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.[25]

Appropriately, the offices of the Information and Privacy Commissioners are designed to be independent of the administrative branch of government.[26] Each commissioner is appointed by the Governor in Council (Cabinet), with approval

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[25] *Ibid.* at para. 39.

[26] Section 2 of the *Access to Information Act* states that "decisions on the disclosure of government information should be reviewed independently of government."

by resolution of the Senate and House of Commons.[27] They are appointed on good behaviour for seven years and may be removed by the Governor in Council on address of the Senate and House of Commons.[28] They receive the same salaries as judges of the Federal Court,[29] and they report on their activities to Parliament, not to the Government.[30]

In keeping with the ombudsman function, the primary duty of both the Information and Privacy Commissioners is to independently and impartially investigate and make recommendations with respect to complaints from persons alleging that a government institution has breached their rights under the *Access to Information Act* or *Privacy Act*.[31] Both commissioners have robust investigative powers, including the rights to summon and enforce the appearance of witnesses, compel witnesses to give evidence or produce documents, and enter premises of government institutions and inspect records found there.[32] Both also have the authority to access any document (except Cabinet confidences) under the control of a government institution, including documents that would otherwise be protected by a legal privilege.[33] After completing the investigation, the Commissioner must report his or her findings to the head of the government institution in question. If the Commissioner finds that the complaint is well-founded, the Commissioner may recommend that the government institution take corrective action.[34] Neither Commissioner has the power to order the release of information or compel the institution to do anything or refrain from doing anything with respect to the information. If the government institution does not follow the Commissioner's recommendation to disclose information, either the

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27 See *Access to Information Act*, s. 54; *Privacy Act*, s. 53.

28 *Ibid.*

29 See *Access to Information Act*, s. 55(2); *Privacy Act*, s. 54(2).

30 *Access to Information Act*, ss. 38-40; *Privacy Act*, ss. 38-40.

31 Under s. 30(3) of the *Access to Information Act* and s. 29(3) of the *Privacy Act*, where "satisfied that there are reasonable grounds to investigate," the Privacy Commissioner may also initiate a complaint.

32 See *Access to Information Act*, s. 36; *Privacy Act*, s. 34.

33 See *Access to Information Act*, ss. 36(2) and 69; *Privacy Act*, ss. 34(2) and 70.

34 See *Access to Information Act*, s. 37; *Privacy Act*, s. 35.

complainant or the Commissioner (with the consent of the complainant) may apply to the Federal Court for a review of the institution's decision.[35] The Court has the power to order the disclosure of the information.[36]

The Information and Privacy Commissioners also have a number of other important functions. The Privacy Commissioner, for instance, is empowered to audit government institutions to ensure that they are complying with their obligations under the Act, recommend changes to effect compliance, and report failures to comply to the institution and Parliament.[37] The Privacy Commissioner may also assess whether a government institution's decision to designate a data bank as exempt from disclosure was correct, and ask the Federal Court to rule on the question if the government institution fails to accept the Commissioner's determination that it was not.[38] Both commissioners must also submit annual

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35 See *Access to Information Act*, ss. 41-42; *Privacy Act*, ss. 41-42. These provisions, it should be noted, permit the complainant to apply to the court for a review of the government's decision regardless of the position taken by the Commissioner. Under both statutes, however, judicial review is generally limited to cases where the government institution has refused to disclose the requested information. Under s. 44 of the *Access to Information Act*, a third party may ask the Federal Court to review a government institution's decision to release certain kinds of sensitive, proprietary information. In addition, the Privacy Commissioner may, pursuant to s. 36 of the *Privacy Act*, ask the Court to review information held in "exempt" data banks (as mentioned in the text accompanying note 38, *infra*). Judicial review is not available, however, for other violations of the Acts; for example, where it is alleged that a government institution has used or disclosed personal information in violation of the *Privacy Act* or disclosed the requested information after an unreasonable delay under the *Access to Information Act*. See *X v. Minister of National Defence*, [1991] 1 F.C. 670 (T.D.); *Gauthier v. Canada (Minister of Consumer & Corporate Affairs)* (1992), 58 F.T.R. 161; *Chandran v. Canada (Minister of Employment and Immigration)* (1995), 91 F.T.R. 90.

36 See *Access to Information Act*, ss. 49-51; *Privacy Act*, ss. 48-49.

37 *Privacy Act*, s. 37. The Information Commissioner does not have a similar power. Traditionally, the Privacy Commissioner's audit power has been used sparingly. The Commissioner has recently indicated, however, that she intends to make greater use of privacy management audits. See Privacy Commissioner of Canada, *Annual Report to Parliament, 2004-2005: Report on the* Privacy Act (Ottawa: Minister of Public Works and Government Services Canada, 2005) at 61.

38 *Privacy Act*, ss. 36 and 50.

reports to Parliament and may in addition submit special reports with respect to urgent matters.[39]

In recent years, the Privacy Commissioner has also taken on another substantial set of responsibilities. With the enactment of Part I of PIPEDA, the Privacy Commissioner has become responsible for overseeing the application of privacy norms across a broad swath of the private sector. As is the case under the *Privacy Act*, the Privacy Commissioner's chief role under PIPEDA is to attempt to resolve complaints that organizations have violated their obligations with respect to the collection, use, or disclosure of personal information. Like the *Privacy Act*, PIPEDA gives the Commissioner strong investigative powers, but it reserves decision making authority for the Federal Court, which has remedial powers similar to those provided by the *Access to Information Act* and the *Privacy Act*.[40] The Commissioner is given only the power to make recommendations.[41] PIPEDA also authorizes the Privacy Commissioner to initiate investigations[42] and audit organizations' personal information management practices.[43] Unlike the *Access to Information Act* and *Privacy Act*, PIPEDA also expressly obliges the Commissioner to promote the purposes of the Act by, among other things,

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39 *Access to Information Act*, ss. 38-39; *Privacy Act*, ss. 38-39.

40 See PIPEDA, ss. 14-16.

41 See PIPEDA, ss. 11-13. Unlike the *Privacy Act* and the *Access to Information Act*, PIPEDA also expressly authorizes the Commissioner to attempt to resolve complaints by means of mediation and conciliation. See PIPEDA, s. 12(2).

42 See PIPEDA, s. 11(2).

43 See PIPEDA, ss. 18-19. The Privacy Commissioner has not yet performed any audits under PIPEDA. As with the *Privacy Act* audit power, however, she has recently indicated an intention to do so. See Privacy Commissioner of Canada, *Annual Report to Parliament, 2004: Report on the Personal Information Protection and Electronic Documents Act* (Ottawa: Minister of Public Works and Government Services Canada, 2005) at 75. As with the *Access to Information Act* and the *Privacy Act*, PIPEDA obliges the Commissioner to submit annual reports to Parliament. These reports must include commentary on the "extent to which the provinces have enacted legislation that is substantially similar to this Part and the application of any such legislation." See PIPEDA, s. 25(1). Further, in considering whether to declare provincial legislation to be substantially similar, it is government policy to seek the views of the Privacy Commissioner. See Industry Canada, "Process for Determination of 'Substantially Similar' Provincial Legislation by the Governor in Council," *Canada Gazette*, Part 1, August 2, 2002, pp. 2385-87.

conducting public educational programs, undertaking and publishing research, and encouraging organizations to develop compliance policies.[44] And in keeping with the constitutional reality of shared jurisdiction over privacy protection, PIPEDA also empowers the Privacy Commissioner to consult with provincial authorities to ensure that "personal information is protected in as consistent a manner as possible."[45]

Apart from their express, statutory duties, the Information and Privacy Commissioners have been active in promoting the values of access and privacy in a variety of national and international fora. Commissioners have commented on proposed legislation and government policies, appeared before parliamentary committees, conducted surveys, sponsored research, published summaries of findings, and given public lectures.[46]

It can be seen, then, that while the primary role of the Information and Privacy Commissioners continues to be that of an ombudsman – investigating complaints and issuing advisory findings – their functions are in fact multi-faceted. As Colin J. Bennett has said of the Privacy Commissioner, she is "expected at some point to perform seven interrelated roles: ombudsman, auditor, consultant, educator, policy advisor, negotiator and enforcer."[47] Many of these roles, I would add, are also performed by the Information Commissioner. And each of these roles, and the increasingly strenuous demands they place on the offices of the two commissioners, must be considered in assessing the wisdom of any form of merger.

A History of Proposals to Merge the Offices of the Information and Privacy Commissioners

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44 See PIPEDA, s. 24. As evidenced by the educational material available on her website. See http://www.privcom.gc.ca. The current Privacy Commissioner, Jennifer Stoddart, has pursued these obligations vigorously.

45 PIPEDA, s. 23.

46 Many of these endeavours are warehoused on the Commissioners' web sites. See http://www.privcom.gc.ca/ and http://www.infocom.gc.ca/. See also Privacy Commissioner of Canada, *supra* note 37 at 73-75.

47 Colin J. Bennett, "The Privacy Commissioner of Canada: Multiple Roles, Diverse Expectations and Structural Dilemmas," (2003), 46 *Canadian Public Administration* 218 at 237.

The possibility of merging the Information and Privacy Commissioners' offices was in some sense contemplated from the time Parliament first adopted the *Access to Information Act* and the *Privacy Act*. Section 55 of the latter statute provides that the "[t]he Governor in Council may appoint as Privacy Commissioner . . . the Information Commissioner appointed under the *Access to Information Act*." This power, however, has never been invoked. There have always been two separate commissioners, and the two offices have always operated independently of one another, though for the period between 1983 and 2002, the two officers shared corporate management personnel (*i.e.* finance, human resources, information technology, and general administration).[48]

In 1985 and 1986, the idea of merging the two offices was considered by the parliamentary committee responsible for the three year statutory review of the two Acts.[49] The committee recommended that the offices be kept separate in order to avoid any real or perceived conflict of interest in the discharge of the commissioners' mandates.[50] In the 1992 budget, the Government announced an intention to merge the two offices as part of an effort to streamline government and "encourage a balancing of interests between the two objectives of privacy and access to information."[51] The Government planned to use section 55 of the *Privacy Act* to appoint the Information Commissioner as Privacy Commissioner. Information Commissioner John Grace spoke in favour of the proposal. The proposal was criticized, however, by a number of parties (including Privacy Commissioner Bruce Phillips, privacy advocates, and the Canadian Bar Association), and it was not implemented. In the mid-1990's, the Government

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48 The two offices continue to share mail-sorting and library facilities and, occasionally, conference rooms.

49 See *Access to Information Act*, s. 75(2); *Privacy Act*, s. 75(2).

50 See House of Commons, Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy: Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act* (Ottawa: Queen's Printer for Canada, 1987) at 37-38 ("Standing Committee Report").

51 See Information Commissioner of Canada, "Position Paper: Oversight Models under the Federal Access and Privacy Acts: Single Commissioner vs. Dual-Commissioners" (24 October 2003) (quoting the 1992 budget announcement), available at http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=90.

considered the idea of merging the Information and Privacy Commissioners' offices with the Canadian Human Rights Commission. This proposal too was ultimately rejected. The Government returned to the idea of merging the Information and Privacy Commissioners' offices in 1998, but again no action was taken. In 2001, an ad hoc parliamentary access to information committee recommended the merger of the two offices,[52] but the government did not respond publicly to the proposal. Lastly, in October 2003, Information Commissioner John Reid authored a position paper advocating the merger of the two offices.[53] The Government, however, did not move forward on this proposal.

Access and Privacy Legislation in the Provinces, Territories, and other Countries

The various proposals to merge the offices of the Information and Privacy Commissioners have undoubtedly been influenced by the adoption in the provinces and territories of a model combining the functions of an information and privacy commissioner in a single office. In every province and territory, access and privacy issues are handled by one office. There are important differences, however, in the ways these offices function. There are three basic models. In the first, which has been adopted by Quebec,[54] Ontario, British Columbia, Alberta, and Prince Edward Island,[55] there is a single commission[56]

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52 See MP's Committee on Access to Information, "Final Report," available at http://www.johnbrydenmp.com/mpsonaccess/Meetings/Minutes/Nov12001.htm.

53 See Information Commissioner of Canada, *supra* note 51. As discussed below, Commissioner Reid has since repudiated this position.

54 Quebec was the first province to adopt this model, in 1982. See generally Paul-André Comeau and Maurice Couture, "Accèss à l'information et renseignements personnels: le précédent québécois" (2003), 46 *Canadian Public Administration* 364 at 365.

55 See *Act respecting Access to documents held by public bodies and the protection of personal information*, R.S.Q., c. A-2.1; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56; *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Schedule A; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165; *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5; *Freedom of Information and Protection of Privacy Act (No. 2)*, R.S.P.E.I. 1988, c. F-15.01.

56 Note, however, that in Quebec there is not a single commissioner, but rather a five person tribunal (the *Commission d'accès à l'information du Québec*). As a consequence of this as well as other features of its legislation, the complaints resolution process in Quebec is more formalized and legalistic than in Ontario,

exclusively dedicated to the oversight of the public sector access and privacy regimes. In Quebec, British Columbia, and Alberta, the commission also supervises the application of private sector privacy legislation.[57] In all five provinces, the commission is empowered to make binding orders mandating compliance with the legislation, subject only to limited rights of judicial review. This power differs markedly from the federal commissioners' recommendatory role.

Like the first, the second model includes an office exclusively devoted to both privacy and access. Unlike the first model, however, commissioners[58] in the second model have no order-making power and can only make recommendations as to remedial measures.[59] This model is used in Saskatchewan, Nova Scotia, Newfoundland and Labrador, the Northwest Territories, and Nunavut. As in the federal scheme, appeals of governmental decisions can be made to the courts.

In the third model, adopted by Manitoba, New Brunswick, and the Yukon Territory, the ombudsman is charged with overseeing access and privacy legislation.[60] Consistent with the conventional ombudsman role, in these

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British Columbia, Alberta, and Prince Edward Island. Note also that in Ontario there is a statutory requirement to appoint at least one Assistant Commissioner (s. 4(4)). There are currently two Assistant Commissioners in Ontario: one responsible for access to information and one for privacy.

57 See *Act respecting the protection of personal information in the private sector*, R.S.Q., c. P-39.1; *Personal Information Protection Act*, S.B.C. 2003, c. 63; *Personal Information Protection Act*, S.A. 2003, c. P-6.5.

58 In Nova Scotia the term "Review Officer" is used instead of "Commissioner."

59 See *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01; *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5; *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1; *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20; *Access to Information and Protection of Privacy Act (Nunavut)*, S.N.W.T. 1994, c. 20. Note that the privacy provisions of the Newfoundland and Labrador statute have yet to be proclaimed in force. Note also that Nunavut inherited the Northwest Territories statute, which continues in force in Nunavut as amended by s. 76.05 of the *Nunavut Act*, S.N.W.T. 1998, c. 34.

60 See *The Freedom of Information and Protection of Privacy Act*, C.C.S.M., c. F175; *Protection of Personal Information Act*, S.N.B. 1998, c. P-19.1; *Right to Information Act*, S.N.B. 1998, c. R-10.3; *Access to Information and Protection of Privacy Act*, S.Y.T. 1995, c. 1.

jurisdictions the ombudsman is limited to making recommendations; the power to issue binding orders is reserved for the courts.

Internationally, the picture is somewhat different. In most nations with analogous[61] privacy and access legislation, oversight responsibility is assigned to separate agencies. This is the case, for example, in Australia,[62] New Zealand,[63] France,[64] Ireland,[65] and Sweden.[66] The United Kingdom[67] and Germany,[68] however,

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61 The legislative scheme in the United States is not analogous to Canada's. The United States has no equivalent federal privacy legislation, and the *Freedom of Information Act*, 5 U.S.C. § 552, as am. Public Law No. 104-231, 110 Stat. 3048 (1996), does not provide for any kind of independent agency oversight. Remedies for violations of the statute, however, may be pursued in the federal courts.

62 The *Freedom of Information Act 1982*, no. 3 (1982), is overseen by the Attorney-General's Department, and the *Privacy Act 1988*, no. 119 (1988), is overseen by the Office of the Privacy Commissioner.

63 The *Official Information Act 1982* (N.Z.), 1982/156, is overseen by the Office of the Ombudsmen, and the *Privacy Act 1993* (N.Z.), 1993/28, is overseen by the Office of the Privacy Commissioner.

64 *Loi n° 2000-321 du 12 avril 2000*, amending *Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal*, J.O., 18 July 1978, 2851, which addresses access to information, is overseen by the Commission d'Accès aux Documents Administratifs. *Loi n° 2004-801 du 6 août 2004*, amending *Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés*, J.O., 7 January 1978, 227, which deals with data protection, is overseen by the Commission Nationale de l'Informatique et des Libertés.

65 The *Freedom of Information Act 1997*, no. 13 (1997) (am. by *Freedom of Information (Amendment) Act 2003*, no. 9 (2003)), addresses access issues, and is overseen by the Information Commissioner, while the *Data Protection Act 1988*, no. 25 (1988) (am. by *Data Protection (Amendment) Act 2003*, no. 6 (2003)), deals with privacy and is overseen by the Data Protection Commissioner.

66 Sweden has had a freedom of information Act since 1766 (it is one of the four "fundamental laws" that form its constitution), and the principle of public access is the general responsibility of the Ministry of Justice, although the Ombudsman also plays a role in procedural matters. Sweden's *Personal Data Protection Act* (*Personuppgiftslagen (PUL)*), SFS 1998:204, is overseen by a special body, the Swedish Data Inspection Board.

67 The Information Commissioner is responsible for administering both the *Freedom of Information Act 2000* (U.K.), 2000, c. 36, and the *Data Protection Act 1998* (U.K.), 1998, c. 29.

have recently established unified offices responsible for supervising both privacy and access legislation.

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[68] In Germany, the *Federal Data Protection Act* (*Bundesdatenschutzgesetz (BDSG)*), BGB1. I 2003, p. 66, deals with privacy issues, while the *Federal Freedom of Information Act* (*Informationsfreiheitsgesetz* (IFG)) addresses access to information. The latter was passed only in the summer of 2005, and will come into effect on January 1, 2006. The BDSG is overseen by the Federal Data Protection Commissioner. Although the IFG makes reference to the Federal Commissioner for Freedom of Information, s. 12(2) specifies that the Commissioner's duties to be performed by the Federal Commissioner for Data Protection. In other words, the offices are unified. See Federal Data Protection Commissioner, "Press Release: The Freedom of Information Act was passed, the Federal Data Protection Commissioner becomes Commissioner for the Freedom of Information" (3 June, 2005), available at http://www.bfd.bund.de/information/pmen12.pdf.

PART II: THE MERITS OF MERGER AND CROSS-APPOINTMENT

Introduction

As the experience in the provinces and territories demonstrates, having a single office and commissioner for both access to information and privacy is a tenable model. The provincial commissioners and many of the experts I consulted generally agreed that the single commission model works well in the provinces. It does not necessarily follow, however, that it would be wise to switch to this model at the federal level. While the federal access to information and privacy regimes can and should be improved in a number of respects, they have served Canadians well. Over the past 22 years, users of these systems have become very familiar with the existing model, and on the whole they are satisfied with its structure. As discussed in Part III of this Report, the most pressing challenges facing the federal access and privacy regimes do not stem from the organization of the Information and Privacy Commissioners' offices. Merging the offices, or appointing one commissioner to preside over both, would do little to respond to these challenges. For these reasons, the burden of persuasion lies with those advocating the adoption of a single commissioner model.

There are two sets of arguments relevant to the proposal to adopt the one commissioner model at the federal level. The first relates to the potential for a merger or cross-appointment to generate financial and administrative efficiencies; that is, to either maintain the current level of productivity at a lower cost, or to increase productivity at current resource levels. The second set of arguments, which in my view lie at the heart of this debate, involve the question of whether a single commissioner model would better serve the policy aims of the access to information and privacy statutes.

The Efficiency Arguments

As mentioned, the 1992 proposal to merge the offices of the Information and Privacy Commissioners was motivated in part by a desire to "streamline" government and effect cost savings. Though the current Government has not indicated whether it believes that a merger would achieve these goals, the potential for a merger to increase the efficiency of the offices is worthy of exploration.

It must be stressed, however, that in the time available, I could not undertake a comprehensive assessment of the organization and management of

the two offices. To the extent that efficiency is relied on as a justification for any merger, it will be critically important for such an analysis to be performed before any merger is pursued as, on the evidence available to me, it seems unlikely that a merger would achieve substantial efficiencies.

Neither the appointment of the Information Commissioner as Privacy Commissioner under section 55 of the *Privacy Act* nor the wholesale merger of the two offices would likely result in a significant reduction of expenditures. In the former case, the elimination of one commissioner would save the costs associated with the salary, benefits, and expenses associated with the position. However, the savings, as compared to the total combined expenditures of the two offices, would be modest.[69] Moreover, the elimination of one commissioner would likely require the appointment of additional assistant or deputy commissioners to perform at least part of the work of that Commissioner.

The financial situation associated with a wholesale merger is somewhat more complicated. The operations of the two offices are similar in many respects. As detailed above, the core function of each office is to investigate and report on alleged violations of Canadians' access and privacy rights. In theory, a merger could effect savings in areas of duplication. A merged office would enable some investigators and lawyers, for example, to work on both access to information and privacy files.

In practice, however, it is likely that any such savings would be minimal. There is nothing to indicate that either office has any significant excess capacity among investigative, legal, or any other personnel. To the contrary, the evidence indicates that both offices are straining to fulfil their core mandates under current funding arrangements.[70] While some degree of efficiency might be gained by allowing for greater flexibility in work assignments, this gain would not likely be

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[69] In the fiscal year 2004-2005, the budgets of the offices of the Information Commissioner and Privacy Commissioner were approximately $4.8 million and $11.2 million, respectively. In the case of the Privacy Commissioner, $6.7 million of this total was allocated to PIPEDA-related activities. See Information Commissioner of Canada, *Annual Report Information Commissioner: 2004-2005* (Ottawa: Minister of Public Works and Government Services Canada, 2005) at 76; Privacy Commissioner of Canada, *supra* note 37 at 79.

[70] See Information Commissioner of Canada, *ibid.* at 12-13 and 25; Privacy Commissioner of Canada, *supra* note 37 at 79-80; Privacy Commissioner of Canada, *supra* note 43 at 98.

large enough to either reduce current staffing levels (while maintaining productivity) or substantially increase productivity (while maintaining staffing levels).

It must also be borne in mind that a merger of two offices would generate its own up-front costs, including those associated with reallocating and relocating staff, integrating methodologies, integrating and purchasing new equipment, and so forth. A merger would also likely require significant short-term investments in public education campaigns to allay confusion and concern over the jurisdiction and powers of the new, combined office.[71]

It should also be emphasized that, viewed in relation to overall government expenditures, the costs associated with the two offices are minimal. As mentioned, the combined budgets of the two offices for the 2004-2005 fiscal year were $15 million, representing less than 50 cents per Canadian. By way of comparison, the government's total expenditures for 2003-2004 were approximately $141 billion.[72] In light of the modest costs associated with the two offices, as well as the challenges associated with achieving efficiencies through a merger, it seems unlikely that efficiency considerations could justify either the cross-appointment of a single commissioner to both offices or a full-fledged merger.

It remains to be considered whether significant efficiencies might be gained from having the two offices share corporate services personnel, as was the case from 1983 to 2002. During that period, the Director General of the corporate

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71 The Privacy Commissioner reports that such costs were incurred when the oversight of PIPEDA was added to her office's responsibilities. See Privacy Commissioner of Canada, "Response of the Privacy Commissioner of Canada about Possible Fusion of the Offices of the Privacy Commissioner of Canada and the Information Commissioner of Canada: Submission of the Office of the Privacy Commissioner of Canada to the Hon. Gérard La Forest, who is reviewing the issue" (21 October, 2005), available at http://www.privcom.gc.ca/information/pub

sub_merger_051021_e.asp.

72 See Department of Finance, Canada "Annual Financial Report of the Government of Canada, Fiscal Year – 2003-2004: 1," available at http://www.fin.gc.ca/

afr/2004/afr04_1e.html.

services branch reported to the Executive Director of the Office of the Privacy Commissioner and the Deputy Information Commissioner. While I was not able to conduct a detailed study of the financial implications of this alternative, presumably some degree of savings could be achieved. For the reasons articulated earlier, however, any savings would not likely be large. There is a danger, moreover, that a consolidation of corporate services personnel could result in divided loyalties and conflicts of interest among staff responsible to two co-equal masters. There is some indication that these problems existed to a degree when the two offices shared corporate services.

As in any bureaucracy, accountability and control are best achieved through clear lines of authority and responsibility. It may be possible to employ mechanisms, such as service level agreements, memoranda of understanding, and dispute resolution procedures, providing some degree of accountability for shared services.[73] These mechanisms, however, carry their own costs, and may not be able to guarantee that shared corporate services personnel will not be subjected to conflicting demands by the two commissioners. In light of these difficulties, and the modest degree of savings likely to be generated, I recommend caution in proceeding with any attempt to merge the corporate services branches of the two offices.[74]

Finally, it should be noted that over the past 22 years the two offices' management styles and organizational cultures have become quite distinct. At least in the short term, consolidation would likely produce significant disruption, dislocation, and discord. Moreover, these impacts would be felt at a time when both offices are facing a number of daunting challenges. As is well-known, the office of the Privacy Commissioner is in many respects still recovering from the scandals associated with the last permanent commissioner. During the same period, it has also been required to take on the vast new responsibility of overseeing the application of PIPEDA, a task that now comprises well over half

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[73] Privacy Commissioner of Canada, *supra* note 71.

[74] I understand that the offices of the Information and Privacy Commissioners are currently exploring the possibility of sharing corporate services with the other independent agents of Parliament (the Auditor General, the Chief Electoral Officer, and the Commissioner of Official Languages). Needless to say, the need for robust monitoring, reporting, and accountability mechanisms in such an arrangement would be even greater than would be the case for the sharing of corporate services by only two offices.

of its workload.[75] For his part, the Information Commissioner is currently deeply involved in discussions and debate surrounding the reform of the *Access to Information Act.* In these circumstances, any savings associated with the sharing of resources and services and the elimination of duplication would likely, at least in the short term, be offset by the diminishment of employee morale and productivity.

This is not to say, of course, that a merger should not be pursued simply because it would be disruptive. If it were clear that a merger would improve the effectiveness of the federal access to information and privacy regimes over the long term, then short term disruption could very well be justified. However, as discussed immediately below, it is far from clear that a merger would achieve this. In light of this, the disruption generated by consolidating the two offices must count in favour of maintaining the status quo.

The Policy Arguments

Given the challenges associated with achieving cost savings through a merger of the offices of the Information and Privacy Commissioners, the case for merger must stand or fall on an assessment of whether a single "Information and Privacy" commissioner would have a greater or lesser ability than the existing two commissioners to achieve the policy aims of the *Access to Information Act*, the *Privacy Act*, and the *Personal Information Protection and Electronic Documents Act*.

As I see it, there are four types of arguments related to this question. The first two support the adoption of the one commissioner model; the latter two favour retaining the current two commissioner system. The first argument contends that a single commissioner would provide more consistent and balanced advice to government institutions dealing with both access and privacy issues than is currently given by the two commissioners. The second posits that a single commissioner would have more success in persuading governments to comply with their obligations under the access and privacy statutes than is currently the case. The third argument asserts that a single commissioner would be predisposed to favour one principle at the expense of the other in cases where access and

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[75] In 2006, the Office of the Privacy Commissioner will also be heavily involved PIPEDA's five year statutory review. See Privacy Commissioner of Canada, *supra* note 43 at 30-32.

privacy come into conflict. And finally the fourth argument maintains that a single commissioner would be overburdened and hence have a diminished capacity to pursue the goals of protecting privacy and encouraging openness in government.

Consistency and Balancing

In addition to financial considerations, the Government's 1992 proposal to merge the Information and Privacy Commissioners' offices was grounded on the belief that having a single commission would "encourage a balancing of interests between the two objectives of privacy and access to information."[76] This argument was reiterated by Information Commissioner Reid in his 2003 merger proposal.[77]

Government institutions are subject to both the *Access to Information Act* and the *Privacy Act*, and must weigh both access and privacy values when they conflict with one another. A single commissioner charged with upholding both values, it is argued, would give those institutions more balanced advice. Having a single commissioner would also, on this view, eliminate the problem of institutions receiving conflicting recommendations from the two commissioners.

There is some merit to this argument. The values of access and privacy do sometimes conflict, particularly in cases where a government institution refuses an access request on the basis that disclosure would reveal a third party's personal information.[78] Having a single commissioner, moreover, would by definition eliminate the problem of government institutions receiving conflicting advice from two commissioners.

In my judgment, however, this argument overstates both the frequency and magnitude of conflict between government's access and privacy obligations. As mentioned, the most important source of conflict is section 19 of the *Access to Information Act*, which requires government institutions to "refuse to disclose any record requested under this Act that contains personal information as defined in

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[76] Information Commissioner of Canada, *supra* note 51 (quoting 1992 budget announcement).

[77] *Ibid.*

[78] See *Access to Information Act*, s. 19.

section 3 of the *Privacy Act*."[79] Complaints over the invocation of this exception to access are made to the Information Commissioner, and it is he, and not the Privacy Commissioner, who investigates the complaint and makes a recommendation to the institution.

It could be argued that it would be better for such a decision, which necessarily involves a conflict between access and privacy, to be made by a single person or body responsible for vindicating both values in equal measure. In theory, this might well be the preferable arrangement. There is little evidence, however, that the Information Commissioner is unable to make impartial assessments of the merits of complaints about section 19 exemptions. The *Access to Information Act* and the *Privacy Act* are structured to ensure that privacy is taken into account in all section 19 cases. The Information Commissioner is charged with overseeing the implementation of all of the values inhering in the *Access to Information Act*, including the privacy values incorporated by reference to the *Privacy Act*. Further, the courts have developed an extensive body of jurisprudence on the meaning of "personal information,"[80] which to a considerable extent dictates the advice the Information Commissioner renders to institutions.

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[79] Despite this provision, subsection (2) of s. 19 permits (but does not require) the institution to disclose such information if: "(a) the individual to whom it relates consents to the disclosure; (b) the information is publicly available; or (c) the disclosure is in accordance with section 8 of the *Privacy Act*." Section 8 of the *Privacy Act* sets out a lengthy list of exceptions to the rule that government cannot disclose individuals' personal information without their consent.

[80] See *Canada (Information Commissioner) v. Canada (Transportation Accident Investigation & Safety Board)*, 2005 FC 384, 40 C.P.R. (4th) 158; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 1; *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, [2003] 1 F.C. 219, 2002 FCA 270; *Van Den Bergh v. National Research Council Canada*, 28 C.P.R. (4th) 257, 239 F.T.R. 299, 2003 FC 1116; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Canada (Information Commissioner) v. Canada (Minister of Public Works & Government Services)*, [1997] 1 F.C. 164, 70 C.P.R. (3d) 37, 121 F.T.R. 1; *Terry v. Canada (Minister of National Defence)* (1994), 30 Admin. L.R. (2d) 122, 86 F.T.R. 266; *Mackenzie v. Canada (Minister, Department of National Health & Welfare)* (1994), 31 Admin. L.R. (2d) 86, 59 C.P.R. (3d) 63, 88 F.T.R. 52; *Rubin v. Canada (Clerk of the Privy Council)* (1993), 62 F.T.R. 287, (*sub nom. Rubin v. Canada (Privy Council, Clerk)*) 48 C.P.R. (3d) 337; *Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs)*, [1990] 1 F.C. 395, 64 D.L.R. (4th) 413, 28 C.P.R. (3d) 301, 32 F.T.R. 161; *Bland v. Canada (National Capital Commission)*, 3 F.C. 325 (T.D.); *Canada (Information Commissioner) v. Canada (Solicitor General)* (1988), 32 Admin. L.R. 103, 20 F.T.R. 314; *Noël v. Great Lakes*

The available evidence indicates, moreover, that over the years Information Commissioners have done a good job at protecting privacy in section 19 cases. Both the Information Commissioner and the Privacy Commissioner advised me that while section 19 is one of the most frequently invoked exemptions under the *Access to Information Act*, the vast majority of cases are straightforward. The Information Commissioner indicated that in substantially more than half of section 19 complaints, he has supported the government institution's decision not to disclose information on the basis that it constitutes non-exempted personal information. And of the fourteen reported court decisions involving the review of refusals to release personal information,[81] the Privacy Commissioner has intervened to oppose the position of the Information Commissioner in only two.[82] In both cases, the court agreed with the Information Commissioner that the information in dispute constituted an exemption to the definition of "personal information" set out in section 3 of the *Privacy Act* and could therefore be disclosed.

If there is a flaw in this system, it is not a product of having two commissioners. Rather, it stems from the fact that neither the person to whom the information relates nor the Privacy Commissioner may seek redress from the courts for improper disclosures of personal information. Consider the following scenario. In reviewing a complaint regarding the refusal to disclose government information on the basis that it constitutes non-exempted personal information, the Information Commissioner concludes that the personal information exception does not apply. He therefore advises the government institution to release the information, and it agrees to do so. Any person to whom the information allegedly relates could complain to the Privacy Commissioner under s. 29(1)(*a*) of the *Privacy Act*, which requires the Privacy Commissioner to receive complaints

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Pilotage Authority Ltd., [1988] 2 F.C. 77, 45 D.L.R. (4th) 127, 20 F.T.R. 257; *Montana Band of Indians v. Canada (Minister of Indian Affairs & Northern Development)* (1988), 59 Alta. L.R. (2d) 353, 18 F.T.R. 15, 31 Admin. L.R. 241, (*sub nom. Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs)*), [1988] 5 W.W.R. 151, 51 D.L.R. (4th) 306, [1988] 4 C.N.L.R. 69, [1989] 1 F.C. 143, 26 C.P.R. (3d) 68.

81 See cases cited *ibid.*

82 *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 1; *Bland v. Canada (National Capital Commission)*, 3 F.C. 325 (T.D.).

"from individuals who allege that personal information about themselves held by a government institution has been used or disclosed otherwise than in accordance with section 7 or 8." The Privacy Commissioner might disagree with the Information Commissioner's determination that the information is not personal and advise the government institution not to disclose the information (if it had not already done so). However, under the *Privacy Act*, neither the Privacy Commissioner nor the complainant has the right to request the Federal Court to prohibit or provide any remedy for the disclosure. Indeed, neither even has a right to be notified that such a disclosure is being contemplated.

Therefore, to account for those few hard cases where it is not clear whether information requested under the *Access to Information Act* is personal, Parliament should consider amending the *Act* to ensure that the Privacy Commissioner is informed whenever: (*i*) a government institution that initially refused to disclose information on the basis that it constitutes personal information changes its mind to comply with the Information Commissioner's advice;[83] or (*ii*) either the Information Commissioner or a complainant goes to court under the *Access to Information Act* to compel a government institution to release such information.[84] Parliament should also consider amending the *Privacy Act* to give the Privacy Commissioner the discretion to inform the third party to whom the information arguably relates of the potential disclosure and give both the Privacy Commissioner and the third party the right to contest that disclosure in the federal courts.[85] With these amendments in place, any conflict between the

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[83] Such a provision would be similar to s. 8(5) of the *Privacy Act*, which requires government institutions to notify the Privacy Commissioner when they intend to disclose personal information on the basis that either the public interest in disclosure clearly outweighs any invasion of privacy or disclosure would clearly benefit the individual to whom the information relates. Section 8(5) also gives the Privacy Commissioner the discretion to notify the person to whom the information relates of the disclosure.

[84] Under the status quo, the Privacy Commissioner is likely to be made aware of cases involving disputes over the application of the personal information exception in the *Access to Information Act* and may seek intervener status before the court. Nonetheless, I see no reason why there should not be a legal obligation to inform the Privacy Commissioner of such cases, and more importantly, to give the Commissioner access to the courts as of right.

[85] I leave aside the broader question of whether the *Privacy Act* should be amended to give the Privacy Commissioner and affected individuals a general right to seek judicial remedies for the improper collection, use, or disclosure of personal information by government institutions. I note, however, that the Privacy

views of the Information and Privacy Commissioners could be resolved by the courts.

The Information and Privacy Commissioners may also come into conflict in giving differing advice to the Government and Parliament on the access and privacy implications of proposed and existing legislation and policies. In its 2001 report, the ad hoc parliamentary Committee on Access to Information supported its merger proposal largely on the basis that the public airing of divergent positions by the two commissioners constituted an "unseemly spectacle."[86]

In my view, there is nothing unseemly in the fact that the commissioners may occasionally give conflicting advice to government, even when they express such differences in public fora. To the contrary, the exchange of reasoned debate between official advocates for differing politico-legal values promises to enliven and enrich our democracy. At times, legislators and government officials may be frustrated by the absence of a single, authoritative source of advice on matters involving both access and privacy. It does not follow, however, that the political decisions flowing from such advice would necessarily be sounder than those ensuing from healthy debate between opposing advocates. Many of the federal and provincial commissioners I consulted indicated that such debate has been very productive in improving a variety of legislative and policy proposals.

It should also be stressed that, as with complaints relating to section 19 of the *Access to Information Act*, there have been very few instances where the commissioners have given conflicting advice to government on legislative or policy matters. As the two federal (and many of the provincial) commissioners explained to me, access to information and privacy issues typically arise in very different circumstances.

Disagreements between government and the Information Commissioner over access issues do not typically involve questions of abstract policy. Most disputes arise over the application of that policy to individual cases. In other words, while the two sides usually agree on the basic principles relating to access to government information, they often disagree on the application of those

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Commissioner has recommended such a change. See Privacy Commissioner of Canada, *supra* note 37 at 26.

86 MP's Committee on Access to Information, *supra* note 52 at para. 53.

principles to the facts of a complaint. The Commissioner and government institutions may also differ to some extent on the need for systemic and cultural changes in the way that institutions manage and distribute information.[87] In neither type of dispute are privacy issues a primary concern.

The Privacy Commissioner, in contrast, is more frequently involved in high-level debates about the long-term, systemic, and often transnational effects on privacy of proposed and existing legislation and policy, such as the government's reaction to the threats of organized crime and terrorism and the privacy implications of novel surveillance and information gathering technologies.[88] In most of these cases, the privacy issues centre on the collection and use by government agents of the personal information of ordinary Canadians – not the disclosure of personal information in response to access to information requests. While the federal government's use of search and surveillance technologies and its general response to domestic and foreign security threats may also raise important access to information concerns, such concerns are not likely to conflict with privacy interests. Indeed, to the extent that post-9/11 security measures pose a threat to the civil liberties of Canadians, the principles of privacy protection and open government would appear to be allied, not opposed.

In summary, I do not believe that the one commissioner model would necessarily be better than the two commissioner model in achieving reasonable accommodations between the principles of access and privacy. The mandates of the Information and Privacy Commissioners rarely conflict, and when they do Canadians are generally well served by having the commissioners' presenting contrasting views to the government, the courts, and the general public. Parliament should, however, seriously consider, enacting mechanisms to ensure that the Privacy Commissioner and affected third parties have access to the courts to contest the disclosure of what may constitute personal information.

Working with Government

Proponents of the single commissioner model also argue that it promotes a more trusting, cooperative, and therefore more productive relationship between

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87 See generally Delagrave Report, *supra* note 2, ch. 11.

88 The Privacy Commissioner's positions on many of these issues are detailed on her web site and her most recent annual report. See http://www.privcom.gc.ca/ and Privacy Commissioner of Canada, *supra* note 37 at 17-20.

the commissioner and government. There are two prongs to this argument. First, it is asserted that government institutions would be willing to work more cooperatively with a commissioner whom they perceive to be an impartial arbiter as opposed to a "single-value" advocate. Second, it is contended that a single commissioner would be able to use some of the goodwill generated by the typically more consultative privacy work to dampen some of the hostility and resistance inhering in the relationship between commissioners and governments on access issues.[89]

There is some empirical support for these arguments. In each of the provinces that have adopted the single commission model, the commissioner appears to have achieved a better working relationship with government on access issues than has traditionally been the case at the federal level. This does not mean that there are not at times marked differences of opinion between governments and commissioners in the provinces. It means that there are continuing, healthy relationships based on their understandings of one another's position.

The reasons for this difference are not entirely clear. Many of the individuals I consulted noted that the history, structure, and culture of the federal bureaucracy differs in many ways from those in the provinces. The federal public service, it was observed, is larger and more decentralized than its provincial counterparts, and its agencies are consequently often more autonomous, opaque, and idiosyncratic. Fostering a culture of openness and transparency may therefore be more challenging in the federal sphere than in the provinces.[90] Access requests in the federal sector, I was told, are also more often directly or indirectly related to partisan political debates than is the case in the provinces. It is also possible that federal access requests more frequently involve high-profile or controversial issues than those in the provinces. To the extent that these differences between the provincial and federal governments exist, switching to a single commissioner model in the federal sphere is not likely to improve matters.

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89 See generally Delagrave Report, *supra* note 2 at 97-100.

90 The Access to Information Review Task Force noted, for example, that the "principles of access have not yet been successfully integrated into the core values of the public service and embedded in its routines." See Delagrave Report, *supra* note 2 at 5. See also *ibid.*, ch. 11.

It is also possible, however, that the interactions that single commissioners have with government on the privacy front, which tend to be more consultative and less adversarial than is the case with access, may foster a more cooperative approach on access issues. Government officials who have engaged in productive dialogue with the commissioner on privacy issues are less likely to adopt a hostile and adversarial stance in discussions with the same commissioner on access issues. To the extent that this true, adopting the single commissioner model in the federal jurisdiction might improve the quantity and quality of access to government information.

A federal "Information and Privacy Commissioner" could also turn out to have a greater capacity to influence government on both access and privacy issues than the existing commissioners. As discussed, under the current system there are very few instances of real conflict between access and privacy values. A unified office would, therefore, rarely be required to "balance" the two values in performing its various functions. Government officials may nonetheless be inclined to give more weight to the advice given by a commissioner responsible for upholding both principles than that stemming from a commissioner mandated to vindicate only one.[91] A unified office might also have more success in encouraging government institutions to adopt more comprehensive and proactive information policies that take both access and privacy considerations into account at all stages of the information "life cycle."[92] The recommendations of an "Information and Privacy Czar," in other words, may have more of an impact on legislation, policy, and practice than the sum of the advice of separate information and privacy commissioners. By presiding over a larger, unified office, a single commissioner may also command more attention and respect from the media and members of the public. This in turn may influence government officials to be more receptive to the commissioner's advice and recommendations.

The provincial experiences demonstrates that there are real benefits to be gained by moving to a single commissioner model in cultivating a cooperative and productive relationship between the commissioner and the government on access, and to a lesser extent, privacy issues. Given the significant differences that exist between the provincial and federal environments, however, it is difficult to

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91 See generally Bennett, *supra* note 47 at 232.

92 See generally Privacy Commissioner of Canada, *supra* note 71.

assess the magnitude of this benefit. As mentioned in the Delagrave Report, there are undoubtedly ways in which relations between the federal government and the Information Commissioner's Office could be improved.[93] But given the nature of the bureaucracy and political environment at the federal level, it may be naive to believe that any commissioner, whether operating out of a unified or single purpose office, could productively pursue the kind of cooperative, non-adversarial approach that seems to work in the provinces. To the extent that this is true, the policy aims of the *Access to Information Act* may be served best by a single minded, single purpose advocate. I would think, however, that the single commissioner model would be at least somewhat more effective in fostering openness and transparency in government than the two commissioner model.

Conflict of Interest

It has been argued that the mandates of the offices of the Information Commissioner and the Privacy Commissioner are inherently incompatible and that merging them could lead to "real or perceived bias."[94] I do not agree. There is no reason to think that a single commissioner, institutionally independent and operating at arms-length from government, could not impartially and fairly balance any conflict between access and privacy concerns. Judges and administrative adjudicators engage in this kind of balancing on a daily basis. The fact that a single federal information and privacy commissioner would, in some respects, act as an advocate for both access and privacy principles would not detract from that commissioner's ability to balance the two values impartially in the few cases where they come into conflict. As mentioned, under the existing federal model, the Information Commissioner must balance access and privacy concerns in making recommendations in cases where government institutions have refused an access request on the basis that compliance would entail the release of non-exempted personal information.

However, while I would not characterize the single commissioner model as creating what lawyers would call either a conflict of interest or a reasonable apprehension of bias, there is a danger that a merger (or the appointment of a single commissioner to preside over both offices) could diminish the vigour with which the access or privacy regimes (or both) are overseen. As discussed, one

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93 See Delagrave Report, *supra* note 2 at 97-100.

94 See Standing Committee Report, *supra* note 50 at 38.

strength of the current model is that it gives both access and privacy values a distinct, high-profile spokesperson. This may be especially important for advocates in both camps who, under the current regime, feel that they have an official champion. Whether by reason of predilection or circumstance, a single commissioner may at times emphasize one element of his or her mission at the expense of the other.

It was primarily for this reason that Information Commissioner Reid backed away from his 2003 merger proposal. His most recent views on the matter are instructive:

> When you issue a public paper, you have to be prepared for the reaction to it. I received, in response to my paper of October 2003, a great deal of thoughtful feedback from members of Parliament, members of the media, academics, access requesters, the interim Privacy Commissioner, and from my provincial colleagues. Almost everyone disagreed with me. They made a strong case for keeping two commissioners and, thereby, ensuring a vigorous public debate about resolving conflicts between privacy and openness rather than incestuous, in-house discussion leading to a single-commissioner position.
>
> Those who commented on my proposal, reminded me that the leaders and citizens of Canada have been well-served by having separate commissioners fighting and advocating for the values of openness and privacy. We have, as a result, a healthier balance between these two values in Canada than does the United States, where freedom of information takes pride of place, or than does Great Britain, where privacy holds sway.
>
> I have been impressed by these arguments; I have recanted; I no longer advocate the single-commissioner model. I accept that there are few shortcomings in the dual-commissioner model and I now admit that the dual-commissioner model is far less open to abuse than would be the single-commissioner model. In the single-commissioner model, it is certainly possible that one value – openness or privacy – would get preferential treatment. In the single-commissioner model, that which is most healthy in a democracy – public debate – gives way to internal, bureaucratic discussion and compromise.[95]

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[95] John Reid, "Remarks to the Canadian Newspaper Association: The Access Act – Moving Forward – a Commissioner's Perspective," Ottawa, Ontario (8 September, 2005), available at http://www.infocom.gc.ca/speeches

speechview-e.asp?intSpeechId=113.

Commissioner Reid's position is supported by the Australian Law Reform Commission and Administrative Review Council, which considered a similar proposal to merge the freedom of information and privacy regimes in that country. It stated:

> There is a need to ensure that the principles of openness and privacy each have a clearly identifiable and unambiguous advocate. The balance between FOI [freedom of information] and privacy can sometimes be a fine one and it may be difficult for an individual not to develop, or be perceived to have developed, a stronger allegiance to one over the other which could lead to accusations of bias in favour of either openness or privacy.[96]

I do not wish to overstate the danger of favouritism inhering in the one commissioner model. At the provincial level at least, a single commissioner may be able to devote adequate attention to and concern for both access and privacy concerns. At the federal level, however, where the size of government is larger, the geographic expanse of the jurisdiction much greater, the range of threats to access and privacy broader,[97] and the scrutiny of interested parties more acute, having two "single purpose" commissioners best enables the vigorous oversight of Canadians' rights to both access to government information and personal privacy.[98]

Workload

Even if a single federal commissioner were equally committed to access and privacy, there remains the question whether the commissioner would have the time to fulfill both mandates adequately. The appointment of a single federal

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96 Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982* (1995) (ALRC 77), available at http://www.austlii.edu.au/au

other/alrc/publications/reports/77/ALRC77.html.

97 The threats to privacy and access posed by government responses to crime and terrorism, for example, are by virtue of the constitutional division of powers much more acute at the federal level than in the provinces.

98 Parliament could seek to mitigate this difficulty by providing, as in the Quebec model, for a multi-person tribunal instead of a single commissioner. The Quebec tribunal, however, operates as a highly formalized, order-making administrative tribunal, not as an ombudsman. It is not clear how such a multi-person body would operate in the recommendatory, ombudsman context.

"Information and Privacy Commissioner" would require assistant or deputy commissioners to become much more involved in the management of the office. While the current Information and Privacy offices have assistant commissioners, in a merged office these officials would necessarily take on even greater responsibilities. The individuals in these positions are undoubtedly capable, but by definition the positions do not carry the same measure of credibility and prestige as a "Commissioner." It is especially important for the Information and Privacy Commissioners to achieve and maintain a prominent public profile by, among other things, appearing personally at national and international conferences, parliamentary committee hearings, and public speaking engagements. It is also crucial for the commissioners to be as involved as possible in the drafting of key policy papers, annual reports, and other publications. The active participation of the commissioners in these activities is, in my view, especially critical at a time when technological and other societal changes are presenting ever-greater challenges to the protection of the privacy and access rights of Canadians. A single commissioner would simply not be able to engage in these endeavours as frequently or extensively as two commissioners.

A merger or cross-appointment, moreover, would also likely diminish the commissioners' ability to be personally involved in the resolution of complaints. This would be particularly detrimental to the access to information regime. Information Commissioner Reid reports that he is currently able to review and approve approximately 90 percent of the complaints that are processed by his office. This "hands-on" approach, he states, is necessary to maintain consistency in the handling of complaints and ensure that the vast majority of complaints are successfully resolved. I agree. Particularly in models where the commissioner has no order-making power (as is the case at the federal level), it is vitally important for the commissioner to be actively and visibly involved in the complaints resolution process. This involvement serves at least two important purposes. First, it helps the commissioner to foster and maintain relationships with the government officials responsible for access decisions. And secondly, it allows the moral authority attaching to the office to be brought to bear, when necessary, to persuade government institutions to comply with their obligations under the *Access to Information Act*. Adopting a single commissioner model would detract from these objectives.

It is also likely that a merger would diminish the capacity of a combined office to engage in public education, research, consultation, policy advice, and

other non-complaints related activities, especially with respect to privacy issues. In the early 1980's, when the *Access to Information Act* and *Privacy Act* were first adopted, access to information and privacy were often thought to be opposite sides of the same "information management" coin. A quarter of a century later, it is apparent that this characterization is inapt. While the functions of the access to information regime have remained fundamentally unchanged, the range of issues and concerns related to privacy has expanded dramatically. In 2005, the Privacy Commissioner must assess and respond to the threats posed by an ever-increasing number of privacy-invasive technologies that did not exist (and could not even have been contemplated) in 1983. And this assessment must now be made not only in relation to privacy threats emanating from government (which was the sole concern of the Commissioner until 2001), but also from those arising out of private sector activity. The range of concerns facing the Privacy Commissioner's office, moreover, is beginning to extend beyond the realm of informational privacy, and now includes such intrusions into private and domestic life as unwanted telephone and email solicitations.[99] So whatever truth there may be to the "same coin" adage (which some would contest), it is likely to become decreasingly relevant in the total landscape of future privacy protection needs.

The work of the Information Commissioner's office, in contrast, continues to be dominated by the complaint resolution process. Understandably, the Commissioner makes every attempt to resolve complaints in a timely manner. Given current resource constraints, his ability to achieve this objective is continually under strain.[100] If responsibility for handling these complaints were given to a merged commission, there is a danger that vitally important policy work in the privacy field would be neglected in favour of the need to maintain reasonable turn-around times for access complaints. Some of the individuals I consulted indicated that this problem exists to some extent in a number of the provinces where the single commissioner model prevails.

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[99] See generally Task Force on Spam, *Stopping Spam: Creating a Stronger, Safer Internet* (Ottawa: Industry Canada, 2005); Privacy Commissioner of Canada, *supra* note 71.

[100] See Information Commissioner of Canada, *supra* note 69 at 12-13, where the Commissioner notes that the backlog of cases is at an all-time high and that the median time to complete an investigation is 6 months. The Office of the Privacy Commissioner is also faced with a significant backlog due to insufficient resources. See Privacy Commissioner of Canada, *supra* note 37 at 38-39.

In theory, the problem could be mitigated by giving a merged office sufficient resources to ensure an adequate level of service for both complaint resolution and other functions. In practice, however, governments have myriad and diverse funding priorities, and are not always able or willing to provide the resources necessary for agencies to fulfill every aspect of their mandates. The problem could also be mitigated to some degree by keeping the existing offices intact and appointing a single commissioner to preside over both. A single commissioner's time would still have to be split between the two offices, however, and any time devoted to ensuring the timely resolution of access complaints would take away from the commissioner's ability to engage in crucial policy work on the privacy side.

Again, it is important not to exaggerate the advantages of the two commissioner model in this context. The provincial experience demonstrates that a single commissioner can play an active role in resolving complaints, developing policy, and performing other necessary functions. The workload facing a single federal commissioner, however, would be substantially greater than that of any provincial commissioner. As mentioned, the federal commissioners deal with a larger and more decentralized bureaucracy. They must also grapple with many highly controversial access and privacy issues (such as those associated with law enforcement, national security, and international affairs) that are not nearly as prominent in the provincial sphere.

Lastly, the diversity of skills and breadth of knowledge that would be required of a single commissioner could make it more difficult to find an appropriate person to oversee both the access to information and privacy regimes. There are undoubtedly many talented persons in Canada who are experienced in both areas, including many of the individuals who are serving or have served as commissioners in the federal and provincial sphere. However, as we have witnessed, the effectiveness of agencies based on the ombudsman model is to a considerable extent dependent on the wisdom, savvy, and integrity of the individual in charge. There is always a risk that the person selected will, for one reason or another, not be up to the task. This risk would be magnified however, by requiring that person to perform an additional function.

To summarize, while I am confident that a single commissioner would be able to act fairly and impartially in the infrequent occasions when access and privacy values conflict, I am not nearly as confident that he or she would be able

to devote adequate concern and attention to both values. For a variety of reasons, the demands facing the federal Information and Privacy Commissioners are greater than those placed on the provincial commissioners. There is consequently great advantage in having separate commissioners at the federal level, each serving as an official champion for a distinct value and each able to promote that value unencumbered by other commitments.

Conclusions

As stated at the outset of this Part, the burden of persuasion lies with those advocating a merger of the offices of the Information and Privacy Commissioners or a cross-appointment of a single commissioner to both offices. I have concluded that this burden has not been met. Each of the one and two commissioner models has advantages and disadvantages. In the abstract, neither is demonstrably superior to the other. But considering the unique features of the federal access to information and privacy environments, and the investments that interested parties have made in the existing structure, moving to a single commissioner model would, in my estimation, have a detrimental impact on the policy aims of the *Access to Information Act*, the *Privacy Act*, and the *Personal Information Protection and Electronic Documents Act*.

There is little practical conflict between the mandates of the two commissioners. In the rare cases where they have differing views, there is great benefit in having these views aired and debated in government, the courts, and public discourse. It may be that a single commissioner would be able to develop a more productive relationship with government on access issues, and so lead to a greater openness and transparency in public affairs. Given the nature of the federal bureaucracy and political environment, however, I am not confident that a merger or cross-appointment would lead to substantial improvements on this front. Lastly, there is an acute risk that switching to a single commissioner would diminish the attention that is currently provided to access and privacy rights. There is a real danger that a single “Information and Privacy Commissioner” would be overburdened and thus unable to respond as effectively to the increasingly demanding challenges posed to both the access and privacy regimes.

It can be seen, then, that while in theory there may be benefits to be gained from adopting the one commissioner model at the federal level, these benefits are

modest and uncertain. The disadvantages of that model, in contrast, are both greater and more likely to materialize. I am therefore of the view that the better course to follow is to continue the system of two separate commissioners.

I am supported in this conclusion by the vast majority of the persons consulted during the course of conducting this review. The current federal Information Commissioner is now firmly opposed to a merger, and though she does not categorically dismiss the idea, it is evident from her written submissions that the Privacy Commissioner harbours serious concerns about it and clearly does not favour it at the present time. For their part, most of the former commissioners, as well as academics, users of the systems, practitioners, and advocates are solidly in favour of maintaining a two commissioner model. Perhaps most tellingly, the provincial Information and Privacy Commissioners consulted, though satisfied that the one commissioner system works very well in the provinces, were either adamantly opposed to a merger at the federal level or at least reluctant to endorse the idea.

If, however, a merger were ever proceeded with, it should be undertaken with an abundance of care. There was almost complete unanimity among those consulted that such a step should not be taken immediately. To do so would be very disruptive for both offices. This would be particularly true of the Privacy Commissioner's office, which is still reeling from the disruption caused by the events surrounding the retirement of the last permanent commissioner as well as the recent addition of the responsibilities associated with PIPEDA. Lastly, no merger or cross-appointment should occur until there has been time for comprehensive study and reform of the *Access to Information Act*, the *Privacy Act*, and PIPEDA.

PART III: CHALLENGES OF THE CURRENT MODEL

Introduction

I have concluded that merging the offices of the Information and Privacy Commissioners or cross-appointing one person to preside over both offices would likely have a detrimental impact on the policy aims of the federal access to information and privacy statutes. If the Government and Parliament nevertheless decide to adopt the one commissioner model, I have recommended that the transition take place gradually, and only after the challenges facing the current access and privacy regimes have been thoroughly studied and addressed. As I have stressed, the limited confines of this review preclude anything other than cursory comment on these challenges. In any event, many of the them are well-known and have been raised, discussed and debated by others, including the federal Access and Privacy Commissioners, the Access to Information Review Task Force, academics, and various advocacy groups. I nevertheless believe that it may be helpful to outline a few of the most important challenges in this Report, and in so doing I have not hesitated to borrow heavily from the existing literature.

Cultivating Access and Privacy Values in Government

Perhaps the most important lesson to be gleaned from 22 years of experience with federal access to information and privacy legislation is that the greatest progress in furthering the goals of the legislation is achieved when government institutions (and in the context of PIPEDA, private organizations) internalize the values of privacy and access and devise mechanisms to promote those values in every relevant aspect of the institutions' activities. While effective complaints resolution processes are indispensable to achieving the legislation's objectives, they are limited in their ability to effect transformative change.[101] Such change requires a genuine commitment by government to openness and transparency in the service of democratic accountability and a similar commitment to the principle that information collected about individuals is private and should, with a minimal number of overriding reasons, be used only for the purpose for which it is collected.

These rights are not likely to be adequately respected by bureaucracies, government or otherwise, unless they are nurtured. This is an especially

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[101] See generally Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: The Panel, 2000), ch. 5, "Internal Responsibility Model."

challenging task on the access to information front. Federal government institutions have traditionally been very reluctant to expose themselves to external scrutiny.[102] There is often a pervasive fear of the embarrassment that such exposure may cause to the institution, its employees, and its political masters.[103] Moreover, in doing their jobs, public servants are primarily interested in performing the tasks assigned to them in the most expeditious manner possible. They may consequently consider access demands as impediments to the efficient performance of their work. [104] Managers may also be concerned that releasing sensitive information will chill the kind of vigorous and frank internal communication necessary for effective public administration.

There is undoubtedly a need for certain kinds of government information to remain confidential. This need is reflected in the many exemptions to access set out in the *Access to Information Act*. The Act itself proclaims, however, that as a general rule "government information should be available to the public," and that "necessary exceptions to the right of access should be limited and specific."[105] If this legal principle is to have its full effect, however, the bureaucracy must experience a profound cultural shift. As stated in the Delagrave Report:

> Since the Act came into force in 1983, debate has centred largely on the design of exemptions, interpretation of the various provisions, and denouncing instances of non-compliance. Government efforts have focused mainly on publishing implementation guidelines, recruiting and training access officers and putting in place processes and systems needed to handle a growing volume of requests, and meet legislated deadlines. Neither at the time the Act came into force, nor since, has there been a comprehensive strategy to raise awareness of, and support for, access to information in the federal public service.[106]

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[102] See Delagrave Report, *supra* note 2 at 157-58; Alasdair Roberts, "New Strategies for Enforcement of the Access to Information Act" (2002), 27 *Queen's Law Journal* 647. The federal Information Commissioner has gone so far as to say that there is an entrenched "culture of secrecy" in government. See Delagrave Report, *ibid.* at 3; Information Commissioner of Canada, *supra* note 69 at 4.

[103] See Roberts, *ibid.* at 648.

[104] See Delagrave Report, *supra* note 2 at 159.

[105] *Access to Information Act*, s. 2(1).

[106] Delagrave Report, *supra* note 2 at 158.

Though some progress has been made toward cultivating a culture of access,[107] much more remains to be done. The Government should make it clear to its senior officials that access should be provided "unless there is a clear and compelling reason not to do so," as the Premier of Ontario recently instructed his Ministers and Deputy Ministers.[108] There is also a need for government institutions to develop sound information management systems,[109] ensure adequate training for access officials,[110] and create proactive dissemination policies encouraging institutions to publish information before it becomes subject to formal access requests.[111] Perhaps most critically, incentives should be put in place rewarding employees for complying with access requests and recognize the importance of facilitating access to the department's success.[112]

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107 See *ibid.* at 159.

108 See Information and Privacy Commissioner/Ontario, *Annual Report 2004* (Toronto: The Commissioner, 2005) at 1.

109 See Delagrave Report, *supra* note 2 at 141-55. A sound information management system would include, for example, a requirement to document and substantiate justifications for invoking exemptions to access and privacy obligations. See Information Commissioner of Canada, *supra* note 69 at 27. Such a system would also demand that records be kept in a manner that facilitates their disclosure. Notably, s. 16 of the Quebec public sector access and privacy statute, *supra* note 55, requires public authorities to classify their documents "in such a manner as to allow their retrieval," establish and keep up to date "a list setting forth the order of classification of the documents," and ensure that the list is "sufficiently precise to facilitate the exercise of the right of access."

110 See Delagrave Report, *supra* note 2 at 128-129. Recently, the Faculty of Extension at the University of Alberta, with the support and participation of the Information Commissioner of Canada, has developed a comprehensive, online certificate program for access and privacy administrators. I urge the federal government to make greater use of this resource and second Information Commissioner Reid's call for the development within the public service of knowledge standards, codes of conduct, and professional accreditation for information rights specialists. See Information Commissioner of Canada, *supra* note 69 at 8. The Information and Privacy Commissioners, I would add, also have a strong role to play in educating public servants about their responsibilities under the Acts. See Delagrave Report, *supra* note 2 at 93.

111 See Delagrave Report, *supra* note 2 at 94 and 134-35.

112 *Ibid.* at 161.

A cultural shift is also required on the privacy side. Though the federal government has made significant strides in incorporating privacy concerns into the legislative and policy development process,[113] more attention needs to be paid to the implications of its myriad programs involving the sharing, matching, and outsourcing of personal information.[114] And as with access to information, better training and the development of privacy management frameworks will also aid in fostering what the federal Privacy Commissioner has called a "culture of compliance" in the public service.[115] As the Commissioner stated in her excellent submission to this review, these initiatives "should be designed to help departments protect the personal information they control by identifying the inherent risks and how to mitigate those risks" and ensure that "privacy management is better integrated with mainstream management practices."[116]

Legislative Reforms

In the main, the challenges to the access and privacy regimes mentioned so far call out for extra-legal solutions; that is, solutions stemming from administrative and cultural innovations. There is also a need, however, for extensive legislative reform. The Government has committed itself to introducing a package of reforms to the *Access to Information Act*,[117] and in 2006 Parliament will undertake a mandatory statutory review of PIPEDA.[118] In addition, Privacy Commissioner Stoddart has called for a comprehensive review of the *Privacy Act* and has made a number of specific suggestions for reform.[119] This Report is not

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113 See Privacy Commissioner of Canada, *supra* note 37 at 9.

114 See *ibid.* at 7, 19-20, 23.

115 See *ibid.* at 23, 27. See also Privacy Commissioner of Canada, *supra* note 71.

116 Privacy Commissioner of Canada, *supra* note 71.

117 See Department of Justice, Canada "A Comprehensive Framework for Access to Information Reform: A Discussion Paper" (April, 2005). The Information Commissioner has also written a draft Bill for Parliament's consideration. See Information Commissioner of Canada, "Opening Remarks to Standing Committee on Access to Information, Privacy and Ethics" (25 October, 2005), available at http://www.infocom.gc.ca/speeches/speechview-e.asp?intSpeechId=116.

118 PIPEDA, s. 75.

119 See Privacy Commissioner of Canada, *supra* note 37 at 17-26.

the place to explore the multitude of issues surrounding these initiatives. What may be useful, however, is to highlight some of the reform proposals, related to the roles of both the Information and Access Commissioners, that have come to prominence in the course of this review.

Advising on Policy and Legislation

As discussed, both the Information and Privacy Commissioners have considered it to be part of their mandates to comment on the potential impacts of various legislative and policy proposals. The Privacy Commissioner has been particularly active on this front in recent years. Unlike the legislation in some of the provinces,[120] however, neither the *Access to Information Act* nor the *Privacy Act* refers to this important function. I, therefore, recommend that both statutes be amended to specifically empower the commissioners to comment on government programs affecting their spheres of jurisdiction.[121] Ideally there should be a corresponding duty imposed on government to solicit the views of the commissioners on such programs at the earliest possible stage. To ignore the commissioners until they raise the issue or it otherwise becomes public serves the interests of neither the commissioners nor the government.

Education and Research

Just as there is a need to inculcate access and privacy norms in government, it is also necessary to educate the public about their access and privacy rights and inform them of the threats posed to these rights by various technological, social, and legislative developments. As mentioned, the federal Access and Privacy Commissioners (along with their provincial counterparts) have made it their practice to actively engage in such endeavours. Recent examples include the federal Privacy Commissioner's report on Quebec's private sector privacy legislation[122] and the British Columbia Information and Privacy Commissioner's report on the impact of the *USA Patriot Act* on public sector

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120 See *e.g.* B.C. FIPPA, *supra* note 55, s. 42(1)(f)-(h); Alberta FIPPA, *supra* note 55, s. 53(1)(f) and (g); Ontario FIPPA, *supra* note 55, s. 59(a).

121 The Access to Information Task Force recommended that the *Access to Information Act* be amended to explicitly provide the Information Commissioner with a mandate to provide advice to government on access issues. See Delagrave Report, *supra* note 2 at 94.

122 Privacy Commissioner of Canada, *supra* note 20.

information outsourcing.[123] Research of this nature, in my view, is especially important to the work of the Privacy Commissioner as the privacy landscape is prone to rapid and unpredictable change.

However, unlike PIPEDA[124] and many of the provincial statutes,[125] neither the *Access to Information Act* nor the *Privacy Act* specifically empowers the commissioner to conduct public education and research. I therefore join with the Access to Information Review Task Force and Privacy Commissioner Stoddart in recommending that the *Access to Information Act* and the *Privacy Act* be amended to recognize the role of the commissioners in educating the public and conducting research relevant to their mandates.[126]

The Commissioners' Role in the Complaint Resolution Process

One of the starkest differences between the federal legislation and that in the largest provinces relates to whether the commissioner has the power to issue final decisions settling disputes about complaints (subject to judicial review). As mentioned, the federal commissioners lack this power, which is granted to the commissioners in Quebec, Ontario, British Columbia, and Alberta (as well as Prince Edward Island).[127] Commissioners in most of these provinces use this power sparingly, preferring whenever possible to resolve complaints through conciliation, mediation, and other informal means. They nonetheless consider the existence of this power, which provides a strong incentive to the parties to settle on reasonable terms, to be essential to their effectiveness.[128] In practice, this model could be described as an "ombudsman with a stick." By and large, claims are settled in a manner satisfactory to all parties.

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123 Information & Privacy Commissioner for British Columbia, *Privacy and the* USA Patriot Act: *Implications for British Columbia Public Sector Outsourcing* (Office of the Information & Privacy Commissioner for British Columbia, 2004).

124 See PIPEDA, s. 24.

125 See *e.g.* B.C. FIPPA, *supra* note 55, s. 42(1)(c)-(e); Alberta FIPPA, *supra* note 55, s. 53(1)(c)-(e); Ontario FIPPA, *supra* note 55, s. 59(d)-(f).

126 See Delagrave Report, *supra* note 2 at 93; Privacy Commissioner of Canada, *supra* note 37 at 26.

127 This model is also used in the United Kingdom, New Zealand, and Ireland.

128 See Roberts, *supra* note 102 at 667.

The apparent success of this model raises the question whether similar powers should be afforded to the federal commissioners. The Access to Information Review Task Force recommended that the idea be given serious consideration, concluding that it is "the model most conducive to achieving consistent compliance and a robust culture of access."[129] The Task Force summarized the advantages of the order-making power as follows:

> Many users would argue that a Commissioner with order-making powers would provide a more effective avenue of redress for complainants. Under the current system, a complainant who is not satisfied with a recommendation by the Commissioner or the government's response must apply for review by the Federal Court. This is both time-consuming and expensive.
>
> Under the full order-making model, the requester receives a more immediate determination. It is more rules-based and less *ad hoc* than the ombudsman model. Commissioners with order-making powers are tribunals. They issue public decisions, with supporting reasons. This results in a consistent body of jurisprudence that assists both institutions and requesters in determining how the Act should be interpreted and applied. As administrative tribunals, under the scrutiny of courts, they are subject to high standards of rigour in their reasons and procedural fairness.[130]

Professor Alasdair Roberts has outlined the following additional advantages of the model:

> Adversarialism may be an inevitable consequence of a statutory scheme that puts great weight on "moral suasion" rather than adjudication. An adjudicator must carefully restrain her comments on the conduct of government institutions, in order to avoid claims of bias in the application of the law. On the other hand, an ombudsman is free, and indeed expected, to define her function as one of advocating vigorously on behalf of the principle of transparency. In doing this, however, a commissioner also liberates officials to define their own role as one defending legitimate interests from harm by disclosure of information. [Office of the Information Commissioner] staff and senior officials may develop narrow and antagonistic conceptions of their roles, each justified

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[129] Delagrave Report, *supra* note 2 at 114. The 2001 Report of the MP's Committee on Access to Information also recommended giving the Information Commissioner order-making powers. See MP's Committee on Access to Information, *supra* note 52 at paras. 53-54. See also Roberts, *supra* note 102.

[130] *Ibid.* at 113.

> by an appeal to legitimate interests and rationalized by the presence of a countervailing role fulfilled by another organization.[131]

There has been some hesitation about adopting this model at the federal level, however. The Government does not currently favour the option,[132] Information Commissioner Reid opposes the idea, and Privacy Commissioner Stoddart has also expressed reservations.[133] There is a danger that a quasi-judicial, order making-model could become too formalized, resulting in a process that is nearly as expensive and time-consuming as court proceedings. It is also arguable that the absence of an order-making power allows the conventional ombudsman to adopt a stronger posture in relation to government than a quasi-judicial decision-maker. There is also some virtue in having contentious access and privacy issues settled by the courts, where proceedings are generally open to the public. The ability of both the commissioners and complainants to resort to the courts may well be seen to be a sufficient sanction for non-compliance, particularly in relation to some of the more sensitive issues arising at the federal level. As well, it must be noted that in each case, the order-making power in the provinces is wielded by a single "Information and Privacy" commissioner or tribunal. If order-making powers were given to the federal commissioners, mechanisms would have to be developed to preclude forum shopping in those few cases involving a potential conflict between access and privacy.[134]

Despite these drawbacks, the option of granting order making powers to the Information and Privacy Commissioners is worthy of further study. In most of the provinces that have adopted this model, the process has not become overly formalized, and the commissioners have been able to attain very high settlement rates.[135] Provided that the unique features of the federal scheme can be

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131 Roberts, *supra* note 102 at 662-63.

132 See Department of Justice, Canada, *supra* note 117 at 30.

133 See Privacy Commissioner of Canada, *supra* note 71. Note however, that in her 2004-2005 Annual Report on the *Privacy Act*, the Commissioner appears to be more supportive of the proposal. See Privacy Commissioner of Canada, *supra* note 37 at 25.

134 See Privacy Commissioner of Canada, *supra* note 71.

135 See Delagrave Report, *supra* note 2 at 113.

accommodated, the order-making model may prove to be a more effective way of vindicating the principles undergirding the *Access to Information Act*, the *Privacy Act*, and PIPEDA. Of course, the advantages and disadvantages of the order-making model would have to be assessed separately in relation to each of these statutes. What is appropriate for access may not be appropriate for privacy (and vice versa); and what is effective in protecting privacy in government may not be appropriate for the private sector.

Finally, Information and Privacy Commissioners in Canada, whether empowered to issue orders or not, attempt to resolve complaints informally through conciliation, mediation and other types of dispute resolution. Experience has shown that these mechanisms can be very effective in reducing backlogs and achieving settlements that are acceptable to all parties.[136] But while PIPEDA expressly recognizes the Commissioner's role in mediation, the *Access to Information Act* and the *Privacy Act* do not.[137] I therefore recommend that these statutes be amended to specifically empower the commissioners to engage in mediation and conciliation.[138]

Conclusions

The primary mission of this Report, as I have stressed, has been to evaluate the merits of consolidating the operations of the offices of the Information and Privacy Commissioners of Canada. My mandate has also required me to assess the challenges posed to the current models, and in this Part of the Report I have briefly described some of the options for reform that I believe are worthy of consideration by the Government of Canada. A number of these proposals have been adopted in the provinces, and they appear to contribute significantly to the effectiveness of their commissions. In my view, the proposals mentioned above should achieve a significant improvement in the federal offices

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136 The recent extensive use of mediation by the Canadian Human Rights Commission, for example, has proven to be extremely helpful in substantially reducing that agency's backlog. See Canadian Human Rights Commission, "Alternative Dispute Resolution," available at http://www.chrc-ccdp.ca/adr/default-en.asp.

137 See PIPEDA, s. 12(2).

138 The Access to Information Review Task Force also recommended that the *Access to Information Act* be amended to formally empower the Information Commissioner to attempt to effect the settlement of complaints through mediation. See Delagrave Report, *supra* note 2 at 96-97.

with or without a merger of the two. Their successful implementation will require a significant infusion of financial resources, but from what I have been able to surmise this would appear to be required in any event.

The major recommendations made in this Report may be summarized in the following manner:

- There should not be either a full merger of the offices of the Information Commissioner and the Privacy Commissioner or an appointment of one commissioner to both offices. These changes would likely have a detrimental impact on the policy aims of the *Access to Information Act*, the *Privacy Act*, and PIPEDA.

- If the Government and Parliament decide to proceed with a merger or cross-appointment, implementation should be delayed for a considerable period of time. The transition should take place gradually, and only after the challenges facing the current access and privacy regimes have been thoroughly studied and addressed.

- Caution should be exercised in proceeding with any attempt to share the corporate services personnel of the offices of the Information and Privacy Commissioners. Care must be taken to establish mechanisms ensuring adequate accountability and control.

- Government must do much more to foster a "culture of compliance" with access and privacy obligations. With respect to access, it should:

  - make it clear to officials that access should be provided unless there is a clear and compelling reason not to do so;
  - develop better information management systems;
  - ensure adequate training for access officials;
  - create proactive dissemination policies; and
  - provide adequate incentives for compliance

With respect to privacy, it should:

- pay greater attention to the implications of programs involving the sharing, matching, and outsourcing of personal information;
- ensure adequate training for privacy officials[139]; and
- develop comprehensive privacy management frameworks;

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

- The *Access to Information Act* and the *Privacy Act* should be amended to recognize the role of the commissioners in educating the public and conducting research relevant to their mandates.

- The option of granting order making powers to the Information and Privacy Commissioners should be studied in further depth.

- The *Access to Information Act* and the *Privacy Act* should be amended to specifically empower the commissioners to engage in mediation and conciliation.

APPENDIX

INDIVIDUALS AND ORGANIZATIONS CONSULTED

Commissioners and Former Commissioners

John Reid, Information Commissioner of Canada

[139] I note that most government institutions have officials who are responsible for both access and privacy issues.

Alan Leadbeater , Deputy Information Commissioner

Jennifer Stoddart, Privacy Commissioner of Canada
Heather Black, Assistant Commissioner

Frank J. Work, Information and Privacy Commissioner of Alberta

David Loukidelis, Information and Privacy Commissioner of British Columbia

Ann Cavoukian, Information and Privacy Commissioner of Ontario
Ken Anderson, Assistant Commissioner (Privacy)
Brian Beamish, Assistant Commissioner (Access)
Peter Khandor, Executive Assistant to the Commissioner

Jacques Saint-Laurent, Chairman, Commission d'Accès à l'information (Quebec)

Gary Dickson, Information and Privacy Commissioner of Saskatchewan

John Grace, Former Information Commissioner of Canada and Former Privacy Commissioner of Canada

Robert Marleau, Former Interim Privacy Commissioner of Canada

David Flaherty, Former Information and Privacy Commissioner for British Columbia

Public Interest Groups

Jason Gratl, President
Murray Mollard, Executive Director
British Columbia Civil Liberties Association

John Beardwood, Vice-Chair
Committee on Access and Privacy
Canadian Bar Association

Philippa Lawson
Executive Director and General Counsel
Canadian Internet Policy and Public Interest Clinic

David Gollob
Vice President, Public Affairs
Canadian Newspaper Association

Jacques St. Amand
Option Consommateurs

John Lawford
Counsel
Public Interest Advocacy Centre

Academics

Professor Colin J. Bennett
Chair, Department of Political Science
University of Victoria

Professor Ian R. Kerr
Canada Research Chair in Ethics, Law & Technology
Faculty of Law, Common Law Section
University of Ottawa

Professor Marc-Aurele Racicot
Faculty of Extension
University of Alberta

Professor Valery Steeves
Department of Criminology
University of Ottawa

Other Resource Persons

Andrée Delagrave
Chair, Access to Information Review Task Force (2002)

Col. Michel Drapeau
Author and Practitioner in Privacy Law

Mary Anne Griffith
Member, Advisory Panel to Office of Canadian Privacy Commissioner

Richard Kurland
Frequent Access Claimant