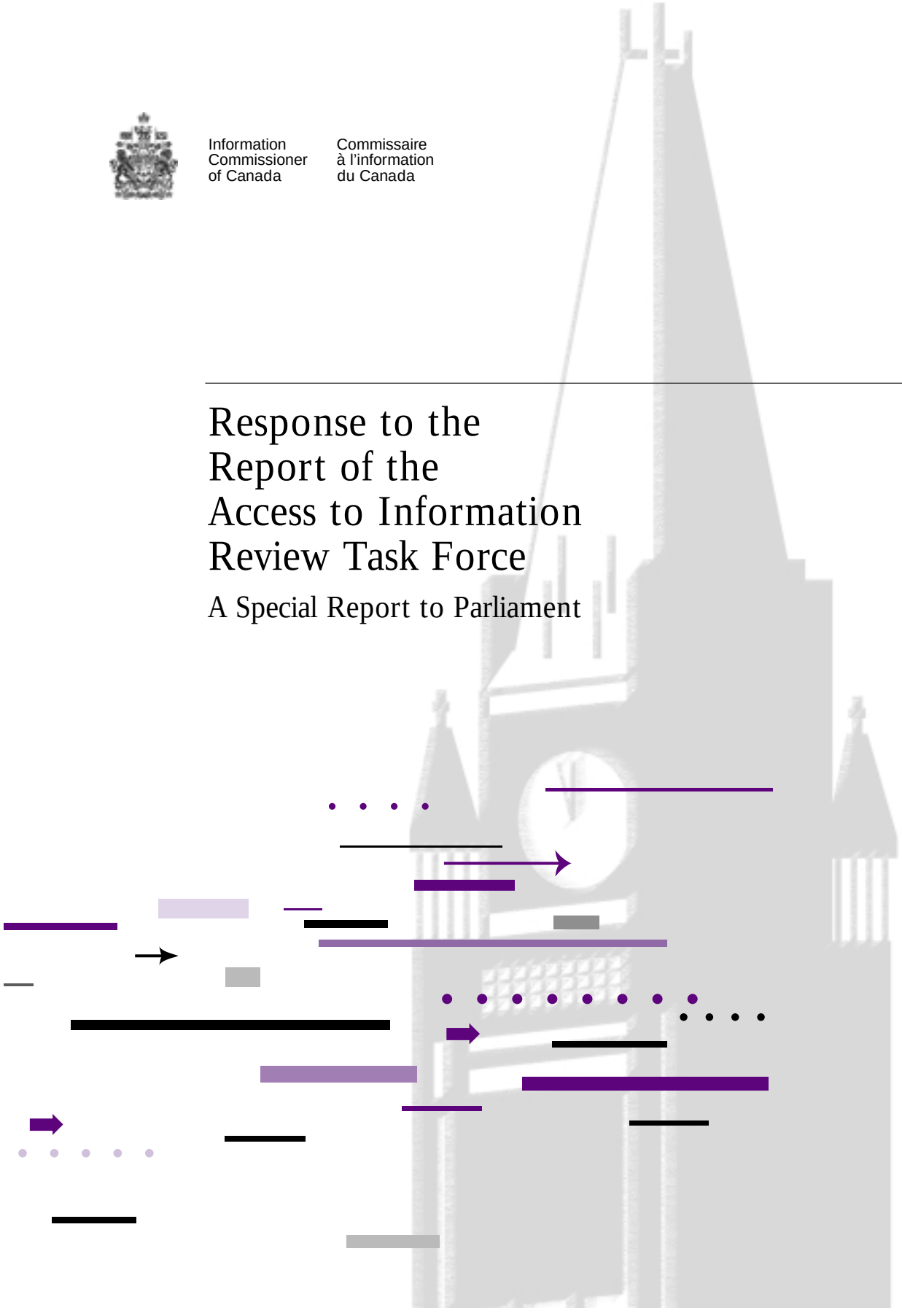
Information Commissioner of Canada
Commissaire à l'information du Canada

Response to the Report of the Access to Information Review Task Force

A Special Report to Parliament



Response to the Report of the Access to Information Review Task Force

A Special Report to Parliament

by

The Honourable John M. Reid, P.C.
Information Commissioner of Canada

September 2002

"Knowledge and understanding of the past is vital equipment for a society as it moves into its future. Transparency in government defines true democracy."

Anthony Summers in forward to: *Secrecy War*s, 2001
by Philip H. Melanson

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

Subsection 39(1)
Access to Information Act

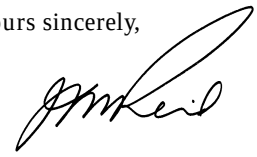
September 2002

The Honourable Peter Milliken
The Speaker
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Milliken:

I have the honour to submit my special report to Parliament entitled:
"Response to the Report of the Access to Information Review Task Force".

Yours sincerely,



The Hon. John M. Reid, P.C.

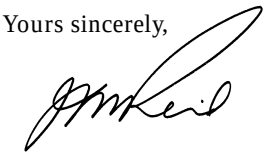
September 2002

The Honourable Daniel Hays
The Speaker
Senate
Ottawa ON K1A 0A4

Dear Mr. Hays:

I have the honour to submit my special report to Parliament entitled:
"Response to the Report of the Access to Information Review Task Force".

Yours sincerely,



The Hon. John M. Reid, P.C.

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Introduction

Canada's former Minister of Justice, Anne McLellan, made her first public comment on the need to reform and strengthen the *Access to Information Act*, during a Liberal party conference accountability session on March 18, 2000. Days later, this Commissioner wrote to the former minister to congratulate her on the initiative and to urge her to conduct the review by means of a public process rather than by means of an internal review by bureaucrats.

The former minister, and the President of Treasury Board, Lucienne Robillard, announced, on August 21, 2000, that they would proceed with the review. Alas, they also announced that they had chosen to pursue their "ongoing efforts to improve access to government information for all Canadians" by means of an internal review by a task force composed of bureaucrats. The Task Force included seven Justice Department lawyers (including the Chair, Andrée Delagrave); two officials from each of Treasury Board Secretariat and National Archives; one official from each of Privy Council Office and Department of Finance; and a lawyer on assignment from the Government of Newfoundland and Labrador.

The work of the Task Force was assisted by an advisory committee of 14 assistant deputy minister level bureaucrats.

The Task Force proceeded with its work, from August of 2000 until May of 2001 in this format. While, early on, it envisaged the creation of an external advisory committee, as a counterbalance to all the insiders, it proved difficult to secure willing candidates and have them positively vetted through the PCO.

It was not until May 9, 2001, that the external advisory committee, comprised of nine individuals, was in place. Three of the nine were former deputy ministers of federal departments--including the Chair of the External Advisory Committee, Roger Tassé, Q.C., former Deputy Minister of Justice. The others came from academia, private business and the media. Only two could be said to be regular users of the access law. This external advisory committee did not have the same frequency of access to the Task Force or depth of briefing from the Task Force as did the internal advisory committee. The external advisory committee was not asked to, and did not, approve the Task Force recommendations.

In addition to these two advisory committees, the Task Force met regularly with a group of some 25 access to information coordinators. Their views and recommendations appear to have had the greatest influence on the Task Force results. From their anecdotal reports of "bad behaviour" on the part of access requesters came most of the anti-user and pro-government recommendations in the Task Force's report. The statistical record, of responsible behaviour by users, went largely ignored.

At no time did the Task Force seek to establish advisory committees of individual users, business users, members of Parliament, members of media or regulators (Office of the Information Commissioner, judges of Federal Court). In this latter regard, a former Assistant Information Commissioner was

originally named to the Task Force, but he departed in the early months of the Task Force's work.

None of this preamble is intended to cast aspersions on any individual who participated on the Task Force or the advisory committees. It is simply intended to show how heavily weighted the process was towards the "insider" perspective. Yes, there were opportunities for Canadians to make written submissions--although there was no publicized invitation for them to do so. As well, focus groups were conducted by the Public Policy Forum, at a very high level of generality, to seek some "public" input on the need for reform of the *Access to Information Act*. On the other hand, in-depth meetings were held with:

- access coordinators from in excess of 60 institutions
- access coordinators from departments which had been given a "report card" by the Information Commissioner
- senior advisory committee of coordinators
- heads of 13 departmental communications groups
- 14 departmental security, defence and law enforcement officials
- four sessions of consultation with government officials conducted by Public Policy Forum.

The extent of the influence of public service insiders is not even fully documented in the Task Force Report and associated documentation. This office is aware that at least two written submissions by former public officials, which influenced the Task Force Report, remain secret. Knowing the identities of the authors would surely assist the public in assessing why the Task Force adopted certain of their suggestions for weakening the investigative powers of the Information Commissioner.

By any reasonable measure, the Task Force review "process" was entirely inadequate for determining how to strengthen the right of access. As a result, there is a great irony in the title which the Task Force gave to its report: "Making it Work For Canadians". By design of the process, and (as we shall see) from an assessment of its content, this set of reform proposals might, more aptly, be titled: "Making it (less) work for government officials".

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

All too often, one must go outside the federal bureaucracy to find a belief that a strong right of access to government-held records is the very lifeblood of a

healthy democracy. MPs, journalists, academics, historians, leaders of business, they are all pushing for expanded access rights, more openness, faster, and more forthcoming service. So many other cherished, democratic attributes--a free press, free elections, ministerial accountability, personal privacy--depend on this lifeblood.

All Canadians cherish their "right" to get the facts on any subject and to get the truth when governments are suspected of rewarding friends, punishing enemies, putting self-interest above public interest or simply of using secrecy in paternalistic ways. Every non-insider review of the *Access to Information Ac*t over the past 20 years has come to the same conclusion: narrow the scope of exemptions, broaden the coverage to include new records and institutions, make the system speedier, reduce fee barriers, strengthen the powers of oversight and make government more accountable for its obligations under the Act. The Task Force recommendations do not measure up to these expectations.

The purpose of this Special Report is to give Parliament, the government and the public the benefit of the Commissioner's response to the Task Force Report. The primary focus of this report will be an assessment of the Task Force proposals for legislative change. Attached as Appendix "A" to this report are the Commissioner's own proposals for strengthening the *Access to Information Act*. They are drawn from his 2000-2001 Annual Report to Parliament (Ch. III, pp. 43-78).

Changing the Balance in Favour of Secrecy

The pro-government bias of the Task Force is immediately apparent in its assessment of the need for changes to the Act's exemption and exclusion provisions. The Task Force makes four recommendations to reduce the current level of secrecy and 15 recommendations to increase the level of secrecy.
The four proposals for more openness are:

i. Convert the Cabinet confidence exclusion to a mandatory exemption and reduce the period of secrecy from 20 to 15 years;

ii. Reduce the period of protection for advice and recommendations from 20 to 15 years;

iii. Limit the period of protection to five years for rejected plans (or those not approved) relating to personnel management or administration; and

iv. Broaden the public interest override concerning third-party information to include the public interest in consumer protection.

The 15 proposals for more secrecy are:

i. Exclude public servants' notes;

ii. Exempt advice or recommendations prepared by contractors;

iii. Exclude notes, analyses or draft decisions prepared by members of quasi-judicial bodies;

iv. Exclude notes, analyses or draft decisions prepared by persons in judicial or quasi-judicial positions in the military justice system;

v. Exclude records seized by government in the course of a criminal investigation;

vi. Exclude records obtained by government in a civil proceeding under an implied undertaking of confidentiality;

vii. Exempt records provided in confidence by political subdivisions of foreign states and other foreign authorities with which Canada has international and/or commercial relations;

viii. Exempt information provided by private firms relating to critical infrastructure vulnerabilities;

ix. Exempt information the disclosure of which would offend human dignity;

x. Exempt draft internal audit reports and related audit working papers;

xi. Exempt information the disclosure of which could damage or interfere with cultural or natural heritage sites, sites having anthropological or heritage value or sacred sites of aboriginal peoples;

xii. The Cabinet be given the discretion to make into mandatory exemptions the confidentiality provisions in other statutes. At present, only Parliament may do so;

xiii. Should new institutions be added to the Act, and should they have special needs for secrecy not covered by the existing exemptions, such information should be excluded from the Act's coverage;

xiv. Should the House of Commons, Senate and Library of Parliament be covered by the Act (as recommended), there should be an "exception" for information that would be protected by parliamentary privilege; and

xv. Policy options presented to Cabinet would no longer be disclosable after the related decisions are made public; they would, instead, be covered by mandatory secrecy for 15 years.

The pro-secrecy imbalance in the exemption / exclusion area is staggering. Even amongst the four pro-openness proposals, there are some hidden, pro-secrecy, surprises--as we will see later in the Cabinet confidence analysis. And the other three recommendations for more openness are timid, of small consequence and fall far short of expectations. The Task Force rejects, almost out of hand, past calls (by the 1986 Parliamentary Review, the Bryden Bill, the Information Commissioner) to rely on exemptions rather than exclusions where secrecy is justifiable and to make more exemptions discretionary and subject to an injury test as well as a public interest override.

Most troubling are the sweeping recommendations for more secrecy. Of primary concern is the Task Force proposal to exclude from the right of access, notes made by public servants in the course of their duties, if the notes are "not shared with others or placed on an office file".

As has been reported in past annual reports of information commissioners, much of the record of instructions given, actions taken, concerns expressed, options considered, when meetings were held and who was present, is contained in the "private" notebooks and "private" file systems of public servants. Rarely are such notes shared with others and rarely are they included on departmental files. Yet, such notes now represent one of the primary sources of information as to the activities of public officials and, hence, their accountabilities.

If adopted, this recommendation would constitute the greatest threat to the right of access since the exclusion of Cabinet confidences. In fact, under this proposal, the secrecy for public servants' notes would be more iron clad than that given to Cabinet secrets--the period of protection would be forever. Almost as troubling is the recommendation (referred to at xii above) that Cabinet, rather than Parliament, be given the authority to override the *Access to Information Act*. This recommendation, too, goes counter to every independent assessment made of the Act in the past 20 years.

A close second, as a threat to the right of access, is the proposal to sweep into the "advice" exemption (section 21) reports prepared by contractors. This proposal ignores a basic design element in our system of government; public

servants owe duties of loyalty to the Crown which contractors do not. Once a minister decides that a matter should be dealt with by people who are not public servants, then the matter falls outside the protected confines of the public servant / minister relationship which Parliament intended to protect with the section 21 exemption. This proposal to extend the cloak of secrecy to contractors would end the accountability of government for the value of money spent on the services of contractors.

Indeed, all of the proposed new exemptions and exclusions are either unnecessary (because existing protections are adequate) or there is no evidence presented to justify the need for them.

Why, one must ask, did the Task Force choose to call for so many new exclusions rather than exemptions? Parliament intended this Act to cover all records held by government (with the exception of what was already published and Cabinet confidences) and it gave the Act preeminence over all other federal statutes. In this way, it demonstrated its desire for this Act to be a complete code regulating the public's right of access. Why does this Task Force recommend departing so dramatically from Parliament's original intent? If new reasons for secrecy can be shown, why not fashion appropriate exemptions? Why opt to exclude the records entirely from the Act's ambit?

There is only one explanation; this approach is intended to limit the powers of the Information Commissioner and the Federal Court to conduct independent reviews of decisions to invoke exclusions. We must bear in mind that it is the government's position in litigation before the courts, that the Commissioner and the courts have no jurisdiction to review government decisions to keep records secret which are excluded from the right of access. Surely, any expansion of non-reviewable secrecy is entirely out of step with the stated purpose of the Act and with the stated purpose of the Act's "reform".

Expanding the Act's Coverage

A related aspect of the Task Force's expansion of the zone of secrecy is its tentative and conservative approach to the issue of the scope of the Act's coverage. The Task Force has recommended that the right of access be extended to certain parts of the legislative branch of government: the House of Commons, the Senate, the Library of Parliament and Parliamentary Officers (Auditor General, Commissioner of Official Languages, Privacy Commissioner, Information Commissioner). On the other hand, the Task Force specifically recommends against making the following institutions subject to the right of access: the Chief Electoral Officer, the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada, the Canadian Judicial Council and the Commissioner for Federal Judicial Affairs.

For the most part, with the exception of the Chief Electoral Officer, there is a reasoned and compelling basis for these specific recommendations. Since the judicial branch of government has such an important role in enforcing the right of access, it could compromise the neutrality of judges with respect to access issues, if these bodies were also subject to the Act. That being said, the Task Force appropriately encourages the federal judiciary to adopt practices which contribute to their transparency.

However, the Task Force refrains from making any other recommendations for adding (or not adding) specific organizations to the Act's coverage. Rather, it recommends that other institutions (Crown Corporations, private firms performing public functions, new mechanisms for delivering federal services) be added to the Act's coverage if:

1. The government appoints a majority of the members of the organization's governing body;

2. The government provides all the organization's financing through appropriations;

3. The government owns a controlling interest in the organization; or

4. The organization performs functions in an area of federal jurisdiction with respect to health and safety, the environment or economic security.

The Task Force recommends that a more comprehensive, case-by-case review be conducted of whether or not these principles apply to specific organizations, whether the Act should apply in whole or in part and how much time an organization needs to prepare prior to becoming subject to the right of access.

This proposal, too, falls far short of what was expected and needed. In 1986, the Justice Committee recommended that Crown Corporations all be brought under the Act's coverage. Now we find ourselves, sixteen years later, after studying the matter again for two years, with a conclusion that more study is needed!

This is not good enough. It is time to take the plunge, to get on with making all our public institutions and those private firms engaged in public functions truly accountable.

But the most disappointing aspect of this part of the Task Force's work is that, if followed, decisions as to whether or not institutions are covered by the Act will be left to the discretion of Cabinet. While the criteria to guide such decisions would be included in the Act, Cabinet could not be legally compelled to add qualified organizations to the Act's coverage. On the other hand, organizations added would be entitled to challenge whether or not Cabinet's decision respected the statutory criteria. This is a recipe for continued anomaly, discrimination and favouritism in decisions about what institutions are or are not covered by the Act. This approach is entirely out of step with other jurisdictions.

The rules governing the Act's coverage need to be clear, stated in legislation and enforceable in the courts. Without this, all the Task Force's fine words about extending the Act's coverage ring hollow.

Relaxing Cabinet Secrecy

The Task Force recommends that Cabinet secrecy be relaxed in three ways:

i) change the exclusion into an exemption, thus, opening the possibility of independent review;

ii) define what is a Cabinet confidence in substantive terms rather than by listing specific types of records. A Cabinet confidence would be defined as information that would reveal the substance of matters before Cabinet and the substance of deliberations between or among ministers; and

iii) reduce the mandatory period of secrecy from 20 years to 15 years.

a) Less rigorous oversight

However, the Task Force proposes that this new exemption be treated in a unique way for review purposes. The Task Force proposes that there be only a one-step process of review, directly to the Federal Court. Under this proposal, a person refused access on the basis of the new Cabinet exemption would not have a right to complain to the Information Commissioner. In this process, there would be no "investigation" by the Commissioner or the Federal Court; rather, there would be a paper process review by the court, based on such affidavit evidence as the government chooses to present. There would be no one before the court, arguing for disclosure, who had actually seen the records--only the court and the Crown would have that privilege under the Task Force proposal.

Presumably, too, this review would not be "free of charge", as is the Commissioner's investigation, nor would there be the possibility for the Information Commissioner to take the case on the complainant's behalf. The Commissioner could only be in a position to make such an offer if he had first investigated the complaint and found it to have merit.

It may be that the reviewing court would permit the Information Commissioner to intervene as an *amicus curiae* in order to ensure that opposing views could be advocated based on full cognizance of the records. If that were to happen--a reasonable likelihood given the court's desire to have the benefit of the Commissioner's voice in access cases--it begs the question: Why cut out the Commissioner's investigative role in the first place? No other jurisdiction which has an information commissioner operates this way. Is this simply a desire to insulate the Clerk of the Privy Council and ministers from the rigors of the investigative process?

As a practical matter, the elimination of the Commissioner's investigative role in Cabinet confidence cases would entail an enormous strain on judicial resources. At present, over 99 percent of complaints about the use of the Cabinet confidence exclusion are resolved without access to the courts. In fact, in the past 19 years, only one case against the government under the Act, concerning the use of the Cabinet confidence exclusion, has been launched in the courts. Yet, in that same period, the Cabinet confidence exclusion has been invoked and investigated by the

Commissioner thousands of times, with a satisfactory resolution achieved. It, quite simply, would not make practical sense to eliminate this first step of review and send those thousands of cases to the court.

All other jurisdictions, in which there is an independent information commissioner, give the commissioner the authority to investigate use, by the government, of the Cabinet confidence exemption. No other such jurisdiction considers the commissioner's role to be incompatible with the special role that Cabinet plays in a parliamentary form of government. In fact, the Supreme Court of Canada recently made it clear in *Babcock* (2002 SCC 57) that the Clerk of the Privy Council and ministers should not be insulated from the rigors of the investigative process into the use of Cabinet secrecy. The court went to some length to emphasize that it is appropriate not only for the ordinary courts to scrutinize Cabinet secrecy, but it is also appropriate, for specialized bodies, such as the Information Commissioner, to do so as well.

b) More secrecy for policy options

This proposal for a limited right of review, of uses of Cabinet confidence exemptions, is not the only troubling aspect of the Task Force's recommendations in this area. Among the details is a recommendation that more information be swept into the proposed mandatory Cabinet confidence exemption than is contained in the current discretionary Cabinet confidence exclusion.

Under the current law, certain information presented to Cabinet for consideration in making decisions ceases to be an excludable Cabinet confidence once the Cabinet decision to which it relates has been made public or, if the decision is not made public, four years have elapsed from the date of the decision. Such information is described in paragraph 69(1)(b) of the Act as: "background explanations, analyses of problems or policy options".

The Task Force, however, proposes the following:

> "Not all material prepared for the consideration of Cabinet ministers needs the strong protection required for the deliberations of Cabinet. The *background material, factual information and analysis of issues* provided to ministers should be accessible, subject of course to other exemptions in the Act." p. 46 (emphasis added)

The implications of this new formulation becomes clearer when one reads the words used by the Task Force to formulate its recommendations 4-5, at page 46 of its report, which reads as follows:

"The Task Force recommends that:

- A prescribed format be developed for Cabinet documents that would allow for easy severance of *background explanations and analyses from information revealing Cabinet deliberations such as options* for consideration and recommendations". (emphasis added)

It seems that the Task Force has been persuaded that the public should not have a right, until after 15 years has elapsed, to see the policy options put before Cabinet for consideration in coming to a decision. There is no explanation given for the Task Force proposal to expand Cabinet secrecy in this way. Similarly, there is no rationale for the Task Force's recommendation that "background material" relating to a Cabinet decision which has not been made public, should remain secret for five years instead of the four-year period of secrecy.

c) Making it mandatory to assert Cabinet confidence

Finally, one cannot leave the analysis of the Cabinet confidence proposals without dealing with the proposal that the new exemption be mandatory and that there be no mechanism by which the privilege may be waived. This proposal entails a significant increase in the scope of Cabinet secrecy beyond what exists. At present, the assertion of Cabinet confidences under the *Access to Information Act* and the *Canada Evidence Act* is a matter of discretion. The discretion resides with ministers and the Clerk of the Privy Council. Moreover, as the Supreme Court of Canada has made clear, in *Babcock*, the exercise of the discretion must be for proper public interest motives.

Thus, as the law now stands, ministers and the Clerk are under no obligation to assert Cabinet confidence but, if they choose to do so, they must do so for proper motives or courts will order the information to be disclosed. Finally, as the law now stands, a decision by the government to assert Cabinet confidence, even if done lawfully and properly, may (since it is discretionary) entitle courts and tribunals to draw inferences adverse to the government.

A change in the law (and you will note that the Task Force, in this area, is recommending that both the *Access to Information Act* and the *Canada Evidence Act* be amended) to make it mandatory to assert Cabinet confidence, would remove this existing, important, mechanism for protecting Canadians against abuses by government of the Cabinet confidence privilege.

The recently released decision of the Supreme Court of Canada in *Babcock* risks being overturned, in the government's favour, if this Task Force's recommendations on Cabinet confidences are adopted.

Additional Obligations on Requesters

The most graphic measure of the pro-government bias of this Task Force is the set of measures directly aimed at those who use the *Access to Information Act*.

To fully comprehend the unnecessarily punitive effect of these recommendations, it is useful to bear in mind some of the statistics which the Task Force sets out at the beginning of its report.

1. Canadians are very restrained in their use of the *Access to Information Act*. Even after 20 years, we have not experienced the 50,000 requests per year originally expected. At present, government receives significantly less than half that number per year.

2. Canadians make focussed requests for small numbers of records. Eighty percent of all access requests result in the release of fewer than 100 pages. Only one percent of requests result in the release of more than 1,000 pages.

3. Ninety percent of requesters make fewer than seven requests per year, only thirty-five percent of requesters make more than one request per year.

4. Less than ten percent of requests result in complaints to the Information Commissioner.

5. The total cost for delivering the rights and obligations under the Act, including the investigation of complaints by the Information Commissioner, is $28,845,000, less than one dollar per year per Canadian, and the per request costs are dropping.

Against these statistical realities, the Task Force chose to listen to anecdotal evidence from access coordinators (not provided in its report) that there were a number of frivolous, vexatious and abusive users of the Act. It also heard anecdotal evidence of broadly worded requests--also not provided--which caused hardship for some, unidentified, department or departments.

Based on these unsubstantiated bits of folklore (which the Task Force admits were "very small"), and despite the clear evidence of moderation and responsibility on the part of the user community, the Task Force proposes that requesting access be made harder, more expensive, slower and more controlled by government. Here is the hammer it proposes to use to kill this fly:

i) at present an access request must be sufficiently clear to enable an experienced employee, with reasonable effort, to locate the requested record. The Task Force proposes that, in addition, the Act be amended to require that requests refer to a specific subject matter or to specific records;

ii) the Act be amended to authorize government institutions, with the agreement of the Information Commissioner, to refuse to process access requests which the government considers to be frivolous, vexatious or abusive;

iii) the Act be amended to remove the "large volume" criteria for extending response times so even a request for a small number of records may qualify for extension;

iv) the Act be amended to authorize government to group requests from the same requester or associated requesters into a single request, thereby enabling the government to maximize fees and opportunities for time extensions;

v) the regulations be amended to double the application fee from five to ten dollars and to increase search and preparation fees to reflect inflation since 1983;

vi) the Act be amended to allow the government to categorize users into three groups - general, commercial, large volume. A different fee structure would apply to each as follows:

1. *general requester*:

   - application fee - $10 (includes: five hours of search and preparation and up to 100 pages of photocopying);
   - additional search and preparation time - an increased rate to be set by regulation (currently $10 per hour);
   - additional reproduction fees - an increased rate to be set by regulation (currently 20¢ per page).

2. *commercial requester:*

   - application fee - $10;
   - all search and preparation time - an increased rate to be set by regulation (currently $10 per hour);
   - all review time - an increased rate to be established by statutory amendment (no fees provided for this function, at present);
   - all reproduction fees - an increased rate to be set by regulation (currently 20¢ per page).

3. *large volume requester* (where total costs exceed $10,000):

   - application fee - $10;
   - all costs directly attributed to the processing of the request.

Access requesters, as a group, will be forgiven for feeling unfairly treated; for feeling that unsubstantiated and undocumented folklore within government has resulted in recommendations which would penalize a user community which, the statistics show, has been restrained and responsible.

There is justification for including some safeguard in the Act against potential abuse. Even though users have, for 20 years, been responsible, it makes sense to have a failsafe provision on the books. To that end, the proposal to authorize

institutions, with the consent of the Commissioner, to refuse to process an "abusive" request or series of requests, could be justified, provided the term "abusive" is carefully defined and its use limited to the rarest of cases. There is no need, however, to go further by piling on fee increases, limiting the scope of requests, charging commercial users for time spent reviewing records for exemptions, and putting the right to request access to a large volume of records beyond practical reach.

In this latter regard, it should be recalled that some subject areas, often those with high profile and public interest (the 1.2 million-page example given by the Task Force relates to the softwood lumber dispute with the U.S.), involve large numbers of records. Why should the public be effectively prohibited from learning about matters on which the government holds large volumes of records? Bear in mind that the requester seeking 1.2 million records from Foreign Affairs and International Trade is not getting the records, even under the current regime, for free. At 20¢ per page, the reproduction costs alone are $240,000 and search and preparation fees at the rate of $10 per hour per employee hour of search may be levied. This is not an "abusive" request; there is no public policy reason to deter making such requests. In fact, at this writing, the Government of Canada has gone to court to prevent a NAFTA panel from blocking disclosure of these records.

The bottom line is this: the current fee structure already ensures that requesters have serious, not frivolous, motives for making requests. Moreover, even the Task Force agrees that an access regime should not be based on a cost-recovery model. In this regard, the Task Force states: "Fees were not intended as a cost-recovery mechanism and should never be an obstacle to legitimate requests." (p. 4)

Requesters will look in vain through this Task Force report to find the "quid for the quo". Where are the recommendations designed to encourage responsible behaviour under the Act by public officials? This Task Force makes not one recommendation for an incentive or penalty directed towards the chronic problem of failure to meet response deadlines which has plagued the administration of this law since its passage. There is not one incentive or penalty proposed to deter public officials from inflating fee estimates, claiming unnecessary time extensions, disregarding deadlines, or applying exemptions indiscriminately. The harshest new obligation this Task Force would impose on public servants is a legal duty, if asked, to assist requesters! That such a proposal would be seriously advocated defies belief. It shows how far we have strayed, in public life, from the time when the duty to assist (asked for or not) was assumed to be the essence of the role of public "servants".

Of course, there are some "user-friendly" recommendations in the report. They are as follows:

1. The right of access be expanded to any person anywhere in the world;
2. Requesters be given the right to request access in format of choice (provided the format exists);
3. Coordinators be "encouraged" to release information as it is processed, without waiting for the deadline or for all requested records to be processed;
4. As a matter of policy, requesters be given a written notice, if responses will be late, containing reasons, expected date of response and notice of right to complain to the Information Commissioner (copy to the Information Commissioner);
5. Fee waiver criteria be set out in policy;
6. Requesters be given the option to choose, at their own expense, expedited delivery methods for requested methods;
7. The Act require institutions, if asked, to make reasonable efforts to assist requesters;
8. The Act require institutions to notify requesters before refusing to process a request, aggregating a request or subjecting a request to full cost recovery. The purpose of the notice is to assist the requester in reformulating the request to avoid the negative outcome;
9. Requesters be given the right to seek Federal Court review of fee-related issues;
10. Requesters continue to have the right to complain to the Information Commissioner at no charge;
11. Treasury Board Secretariat be asked to make INFO SOURCE more user friendly;
12. Institutions be asked to post summaries of released records on websites and deposit hard copies of full documents in reading rooms;
13. Treasury Board be asked to encourage institutions to support electronic processing of access requests;
14. All institutions be asked to disseminate, informally and proactively, information of interest to the public.

Even these "user-friendly" recommendations are tentative, incomplete and grudging. The proposed expansion of the right of access to anyone in the world would have virtually no consequence because non-citizens residing outside Canada now may make requests through in-Canada agents. The proposed right to request access in a format of choice should not be limited, as proposed, to situations where the requested format exists. As is now the case for requests

for translation and for creation of a record from an electronic data base, alternate format requests should be met if "reasonable".

Why, requesters will ask, should coordinators only be "encouraged" to give speedy service? The partial releases proposed by the Task Force should be mandatory, especially when requests are late. How can the Task Force justify its recommendation that notification of late responses be a matter of "policy" rather than law? How can the Task Force justify its recommendation that fee waiver criteria be a matter of "policy" rather than law? It is unconscionable that the obligations falling on users would be made requirements of law while those falling on public officials would be made suggestions of policy!

Most troubling is the limited nature of the Task Force's recommendation that requesters be given the right to seek Federal Court review of fee-related issues. Of course requesters should have that right. But, just as surely, they should have the right to enforce, first through the Information Commissioner and then through the courts, any decision under the Act which results in a denial of access, such as unreasonable extension of time or a failure to provide records in the official language or format of choice.

Changing the Commissioner's Role and Powers

The Task Force proposals concerning the Office of the Information Commissioner also bespeak the insider perspective of the review.

Only four recommendations for legislative change are offered in order to assist the Commissioner in enforcing overall compliance with the *Access to Information Act*. They propose to do no more than enshrine in law activities which are already being undertaken by the Commissioner, subject only to the budget constraints which the government imposes upon him. The four recommendations are:

1. the Commissioner's public education role be recognized in the Act;

2. the Commissioner's advisory role, with respect to the implications for the right of access of proposed government initiatives, and with respect to "best practices" across government, be recognized in the Act;

3. the Commissioner's role in conducting issue-based, system-wide investigations (reviews or audits) be recognized in the Act; and

4. the Commissioner's role in seeking the informal resolution of complaints ("mediation role") prior to conducting formal, evidentiary proceedings, be recognized in the Act.

The last recommendation of the four bears within it some potentially concerning implications. If the recommendation is meant simply to reflect the fact that, by definition, an ombuds-style organization is in the business of mediation, it is uncontentious. If, on the other hand, the recommendation is meant to suggest that the Commissioner should abandon his investigative role (to ensure that rights of requesters are honoured) in favour of a "deal-making" role, where the goal is to see how much or how little each side is willing to give or get, then it is very contentious. The knowledge imbalance between institutions and requesters is far too great (the requesters being totally in the dark as to what is being kept secret) for "mediation" in any traditional sense to be meaningful.

As so-called "mediation" is practiced by access to information commissioners in other jurisdictions, it is a communication-facilitation function. Care is taken, at the front-end of complaint investigations, to ensure that the requester's information needs have been carefully formulated and that they have been well-understood by the appropriate department. Alternative ways of meeting those information needs are explored. In that process, some complaints are withdrawn, settled or modified, some are not. That is also the way "mediation" is practiced at the federal level.

However, in all jurisdictions, complainants are entitled to rely on the Information Commissioner to investigate and independently assess whether or not the degree of secrecy adopted by a department is in accordance with law.

At the federal level, resolutions are not accepted by the Commissioner if they entail illegal excesses of secrecy by government departments.

If, by "mediation", the Task Force suggests that the Commissioner be guided not by what the law requires of government but, rather, by what the requester is willing to accept, that notion is profoundly troubling. Such a suggestion fails to take account of the reality that government departments are in a strong position to "bully" requesters--who may be federal employees, potential grant recipients, persons seeking government contracts, representatives of regulated firms or otherwise vulnerable to government pressure in a myriad of ways.

Opposing these four recommendations which are (although superfluous) supportive of the Commissioner's role are eight recommendations which would profoundly change the Commissioner's role and powers. They are as follows:

1. the Commissioner be required to complete investigations within 90 days, subject to a discretion to extend for a reasonable period, upon notice to the complainant, the government institution and any third parties;

2. the Commissioner be given the discretion to conduct investigations in public;

3. witnesses be given a statutory right to counsel;

4. the Commissioner be prohibited from compelling anyone to produce a communication from or to a legal adviser about the client's rights and obligations under the Act or in contemplation of proceedings under the Act;

5. the Commissioner be prohibited from enforcing his orders by trying a person who has been cited for in *facie* contempt;

6. evidence given by a witness to the Commissioner should no longer be admissible against the witness in a prosecution of the offence set out in section 67.1 of the Act (destruction of records);

7. the Commissioner (and his staff) should no longer be competent or compellable witnesses in a prosecution of the offence set out in section 67.1 of the Act (destruction of records); and

8. section 32 of the Act be amended to require the Commissioner to give notice of intention to investigate a matter not only to the head of the complained-against institution but, also, to any other person the Commissioner considers appropriate.

While it is unclear whether or not the Task Force calls for a statutory amendment in this regard, it does recommend: i) that subpoenas be limited to investigations of specific complaints and not be available for investigations into systemic issues, and ii) that subpoenas only be issued to officials having "actual knowledge of the file".

As a package, these recommendations are designed to make the Commissioner's investigative role conform to the lawyer-dominated, adversarial model of dispute resolution which is designed for the ordinary

courts and for quasi-judicial tribunals which have the power to make binding decisions. Even the proposal for public hearings would have this "judicializing" effect. This model is not appropriate for an investigative agency, inquiring into allegedly secret information, which has only the power to make recommendations for disclosure.

By compressing the time to investigate to 90 days (coupled with resource control), investigations will become more formal. The production of documents, testimony / evidence and representations will, to a greater extent, be governed by rules, orders and lawyers.

This is a package of reforms likely to have been cheered along by those few senior officials of government who refused to voluntarily cooperate with the Commissioner's investigations by refusing to appear or to answer questions. These few officials felt the sting of the Commissioner's investigative powers to compel appearances and to enforce orders to answer questions. These are the people who want to have lawyers run interference for them when the Commissioner comes calling, who want the wall of solicitor-client privilege to be impermeable, who want the Commissioner's subpoena powers to be circumscribed, who want to remove the Commissioner's powers to proceed against persons who have been cited for contempt of the Commissioner's orders.

In this area, the Task Force relied on the foxes to advise on security arrangements for the hen house! The clearest example is the recommendation that the Commissioner's power to enforce his orders be removed. Nowhere in the Task Force's published background papers or accounts of consultations does this recommendation appear. It turns out that it comes from a secret submission made by a former deputy minister who had been cited for contempt by the Commissioner. (The details of the case are set out in the Information Commissioner's 2001-2002 Annual Report at pages 22 to 24.)

This man's disdain for his own accountability obligations, and the Commissioner's independent investigative role, disqualifies him entirely as a persuasive source for *Access to Information Act* reform ideas. Yet, the Task Force chose to listen to him, to agree to keep his submission out of public sight and to adopt his recommendation for curbing the Commissioner's power. The Task Force made no mention of, nor paid any attention to, the detailed reasons of the Federal Court demonstrating why the Commissioner's power to punish contempt is appropriate and constitutional.

The strong investigative powers now given to the Information Commissioner are essential for thorough, independent investigations which hold government to account for the proper administration of the *Access to Information Act*. At all times, in the exercise of these powers, the Commissioner is subject to the oversight of the Federal Court.

Non-Legislative Changes: Fixing the Foundation

The Task Force came to the conclusion that an effective right of access requires a non-statutory foundation comprised of three elements:

a) good management of the government's information holdings. According to the Task Force: "There is an urgent need for leadership and government-wide action in this area." (p. 5)

b) a comprehensive base of information about the performance of institutions in meeting their access to information obligations. According to the Task Force: "…the information being collected by most government institutions does not tell the whole story or even a useful story. Nor is it very helpful in identifying what is being done well and what needs to be done to improve implementation of the Act." (p. 153); and

c) a vibrant culture of support for access to information in the public service and at the political level. According to the Task Force: "Compared with long-standing public service values such as the pursuit of the public interest, neutrality, loyalty to the government and respect for ministerial responsibility, access is a relatively new value. It has yet to be fully integrated with the older values." (p. 158)

It is interesting to note that the Task Force took the view, in these areas, that legislative initiatives are unnecessary. On these matters, the Task Force prefers to leave it to public officials to get their own house in order, in their own way, in their own time. The Task Force philosophy is captured in these words:

> "There is no piece of legislation which is as directly tied to the work of each and every one of the approximately 200,000 federal employees as is the *Access to Information Act*. Public servants create, collect, assess, approve, organize, store, file, search, retrieve, review and release government information. There can be no significant and lasting improvement of access to information without their understanding, cooperation and support. Prescriptive legislation and coercive measures are useful for defining rights and deterring non-compliance. They are less effective, however, in encouraging public servants to act, day in and day out, in ways that further the objectives of the Act." (p. 157)

As a result of this philosophy, that attitudinal change on the part of public officials is not served by imposing legal obligations upon them, the Task Force's good suggestions in these three areas would have no binding force. The Task Force does not face up to the reality that, after 20 years of leaving it up to public servants to get their records, attitudes and statistics in order, they haven't done so. Since even government insiders agree that these fundamentals for an effective right of access are in serious disrepair, it is vital for Parliament to nudge along the process of cultural reform by imposing some, limited, statutory obligations.

a) Information management

> "Everyone is in agreement, however, that there is a crisis in information management in the federal government, as well as in every jurisdiction we have studied". (Task Force Report, p. 141)

The Task Force's blueprint for addressing this crisis is to encourage the government to develop a coherent, government-wide strategy of policies, standards, practices, systems and people to support information management. Part of this strategy would be to direct and coordinate the three government institutions having government-wide information management responsibilities: Treasury Board Secretariat, National Archives and National Library. The Task Force describes well what needs to be done but it is silent on where the responsibility and accountability should lie for developing this framework.

It is folly to rule out the assistance of law in moving forward this vital program of information management renewal. When Parliament passed the *Access to Information Act*, it specifically obligated the "designated Minister", who is the President of Treasury Board, to:

> "cause to be kept under review the manner in which records under the control of government institutions are maintained and managed to ensure compliance with the provisions of this Act and the regulations relating to access to records." (paragraph 70(1)(a) *Access to Information Act*)

This legal requirement to monitor records management should be strengthened by requiring the President of Treasury Board to prescribe the government-wide information management framework of directives, policies, standards, practices and systems and to provide the resources to institutions reasonably necessary for implementing the framework.

Of course, there should be constructive collaboration among the National Archives, National Library and Treasury Board Secretariat in developing the information management framework and in monitoring its implementation. In fact, collaboration should also include the Information Commissioner, Privacy Commissioner and Auditor General--officers of Parliament whose mandates presuppose effective information management in government. Yet, in the end, there should be one focus of responsibility and one minister to be held accountable in Parliament, and that is the President of Treasury Board.

The appropriate vehicle by which the President of Treasury Board should account for the discharge of his or her responsibilities under the *Access to Information Act* is by means of an annual report to Parliament. At present, the Act requires individual departments and the Information Commissioner to report annually to Parliament on their performance under the Act. The same requirement should be imposed on the designated minister. Of course, such a report would cover more than information management matters (more on the other matters, later).

A final word about the information management crisis concerns what the Task Force calls the "duty" of public servants:

> "to create and manage records of policy decisions and operational activities, to classify records for security and filing purposes, and to dispose of records properly at the end of their operational usefulness, including the transfer of historically important records to the National Archives". (p. 146)

This "duty" is not being respected. One of the most troubling contributors to the crisis is the rapidly spreading practice (often, led from the top) of avoiding making records in order to insulate officials from public accountability. Another, is the rapidly spreading practice (which the Task Force wants to institutionalize) of keeping personal notes regarding government affairs which are not included in the institution's system of records.

On this score, too, the Task Force was short-sighted to reject, out of hand, the need for imposing legal requirements. There must be, if progress is to be made in this area, a legal obligation imposed upon all public officials to:

1) document their business activities (decisions, actions, transactions, considerations), and

2) ensure that those records are properly included in an institutional system of records.

b) Performance statistics

The Task Force makes it clear that there is a need to capture and publish better data on how the access to information system is working. According to the Task Force:

> "This improved data and reporting would have several benefits. It would generate the data needed to support institutional and system-wide improvements. It would give both Treasury Board Secretariat and Parliamentarians the kind of information they need to play an active role in monitoring ATI activities. It would help encourage pride in departments that are performing well. It would give Canadians a realistic and dynamic picture of how the ATI system is working. And finally, it would support future research in this area." (p. 154)

Having concluded that better data and reporting is a key ingredient to a healthy right of access, the Task Force recommends that "several common performance measurement indicators" be developed by Treasury Board, in consultation with the Information Commissioner. As well, it recommends that individual departments develop their own performance measurement indicators to assist good management of the function.

With respect to reporting, the Task Force recommends that the individual, institutional annual reports to Parliament be expanded to include:

- "information on strategies to provide information outside the Act;
- initiatives undertaken to improve the access to information system;
- issues arising during the year that significantly affect the institution's Access to Information program; and
- planned improvements to respond to identified problems or trends." (p. 155)

The Task Force also recommends that the Treasury Board's annual aggregate report "provide a much broader view of how the system is working across government, and include analysis of trends on key issues." (p. 155)

Those good recommendations fall short of what is needed. The government has known, since the Act came into force, that its data capture and reporting on the performance of the access program has been inadequate. In report after report, successive information commissioners have urged the President of Treasury Board to address this shortcoming. Yet, despite having the legal authority to prescribe what information is to be included in institutional annual reports, the President of Treasury Board has ignored all such suggestions.

Why should we have confidence that the designated minister will now do what is necessary? That is not to say that the designated minister won't do what the Task Force recommends. The recommended new matters to be covered in departmental annual reports do not even include the performance measurement data. What the Task Force recommended is a "give the good news" approach to performance reporting. What is needed is a "give the whole story" approach.

Thus, in this area too, there is pressing need for statutory direction. First, as stated earlier, the duties of the designated minister (now set out in section 70 of the Act) should be expanded to include the obligation to report annually to Parliament. Second, these annual reports should offer a statistical picture of the overall performance by government in meeting its obligations under the *Access to Information Act*.

Attached, at Appendix B, is the Information Commissioner's proposal for the data which should be captured and reported by individual institutions in their annual reports and which should be aggregated and reported in the Treasury Board Secretariat's annual report.

c) Creating a culture of openness

Public servants, with rare exception, will conduct themselves in the manner expected of them by the law, their political masters and the leadership of the public service. To change culture, the prevailing expectations must change. Culture change in government rarely comes from the bottom up.

The Task Force gets it absolutely right when it suggests that a new message should be transmitted to the public service, from the top, about the value of the right of access in a healthy democracy. The Task Force is also right to suggest that care be taken to ensure that the message gets through, that there be on-going training for public officials about the access program and its importance.

One of the most important recommendations offered by the Task Force is that the government launch a broad, "Open Canada" campaign in the Canadian public service "to enhance awareness of access to information, appreciation of its principles and pride in providing information to Canadians" (p. 164). As the public service of Canada enters into a period of unprecedented hiring, a whole new infusion of managers and employees, there is no better time to instill a change from the old culture of secrecy to the new culture of openness.

Despite the many criticisms, in these pages, of the proposals for legislative reform put forward by the Task Force, this Commissioner supports vigorously the Task Force's proposals for promoting a culture of openness in the public service. The Task Force says it best, in these words:

> "Instilling pride in federal public servants for openness, and making it a strong part of their identity, might well be the single most important improvement to the performance of the access to information régime." (p. 164)

In this area, too, the force of law would be helpful. Parliament should require the designated minister to carry out a program of education for the public and for public officials, concerning the rights and obligations set out in the *Access to Information Act*. As well, the President of Treasury Board should be specifically mandated to provide specialized access to information training to access professionals, managers, deputy ministers, exempt staff and ministers.

Most especially, if a culture of openness is to become embedded in the work practices of public officials, it should, as a function, be better insulated from the political level. In this regard, the role of Access to Information Coordinators needs to be defined in legislation and made more professional. Specific recommendations in this regard may be found in Appendix "A" (at pages 53-56.)

Next Steps

Having received the Task Force Report, it is up to the President of Treasury Board to decide whether or not to proceed with the administrative changes which the Task Force recommends. With the exception of the recommendation that fees be raised, the administrative recommendations are positive and should be proceeded with.

The Minister of Justice must decide how best to deal with the proposals for legislative change. These are highly controversial and do not reflect a broad range of perspectives drawn from the relevant stakeholders. In this context, the Commissioner urges the minister not to draft new legislation based on these Task Force recommendations. The right of access is one of those rights which, by design, is uncomfortable for governments to live with. This is the type of legislation which justifies giving Parliamentarians and the public more freedom to influence the shape of amendments than is possible once a government bill has been tabled. It is to be hoped that the Minister of Justice and the government will support a public review of the Task Force proposals, by a Parliamentary Committee, prior to introducing proposed amendments in the form of a Bill.

Appendix A

BLUEPRINT FOR REFORM

This is a good law, a very good law. It is, nevertheless, long past time to mend its five major weaknesses and to make the numerous "fine tuning" changes necessary to keep this Act current with new forms of governance and technology. Admittedly, it is a "mugs game" to categorize some changes as more important than others. In the end, it will be the package of reforms as a whole which must bear scrutiny. Part A of this chapter sets out in detail the five changes to the Act which the Information Commissioner considers essential to addressing its major weaknesses. They are:

1. transforming the Cabinet confidence exclusion (now section 69) into a more focussed exemption subject to independent review;

2. closing the gaps in the Act's coverage by i) establishing a description of the types of institutions which should be covered by the Act and requiring that all such institutions be included in the schedule of institutions to which the Act applies; and (ii) clarifying the status of records held in the offices of heads of institutions;

3. ending "secrecy creep" by abolishing section 24. That section makes it mandatory to refuse disclosure of any record which any other statute, listed in Schedule II of the Act, requires to be kept confidential;

4. adding incentives and penalties for failure to respect response deadlines; and

5. providing a legislatively defined mandate for Access to Information Coordinators.

Part B of this chapter (pages 56 to 70) contains the Commissioner's recommendations for the less pressing, yet needed, changes to modernize the Act.

PART A – MAJOR REFORMS

i) Reform of Cabinet Confidences

Records described by section 69 of the Act as being confidences of the Queen's Privy Council--hereafter referred to as Cabinet confidences--are excluded from the coverage of the *Access to Information Act* for a period of 20 years from the date of their creation. Section 69 contains a list of seven types of records which constitute Cabinet confidences; it does not, however, contain a definition of what interests are intended to be protected by this exclusion.

Any record which the government considers to be a Cabinet confidence is withheld from an access requester in the same manner as if the record had been withheld under one of the Act's "exemption" provisions (sections 13-26).

Requesters are told, at the time of denial of access, of their right to complain to the Information Commissioner about the denial.

The distinction between an "excluded" record and an "exempted" record becomes significant during the process of investigating and reviewing the government's decision to deny access. When the record has been withheld under section 69, because it is "excluded" from the right of access, neither the Information Commissioner nor the Federal Court of Canada may examine the withheld record to determine whether or not it is, in fact, a Cabinet confidence.

This restriction on the Commissioner's and court's power to examine excluded records is accomplished by two provisions of the Act--sections 36(2) and 46--which state that the power to independently examine records is limited to records "to which this Act applies".

There is, thus, no meaningful, independent review of government decisions to refuse disclosure of any records it considers to be Cabinet confidences. Often called the Act's "Mack Truck" clause, this special treatment for Cabinet confidences is entirely at odds with the purpose clause of the Act, set out in section 2. In particular, it infringes the principle that "exceptions to the right of access should be limited and specific" and it infringes the principle that "decisions on the disclosure of government information should be reviewed independently of government".

A recently decided case (discussed in detail in Chapter VI at pages 107 to 109) [2000-01 Annual Report] illustrates in graphic terms how open to abuse is the section 69 exclusion. In that case, the government endeavoured to remove from public access the content of discussion papers wherein background explanations, analysis of problems and policy options are presented to Cabinet. Section 69 requires that this class of Cabinet confidences shall become subject to the right of access (i.e. no longer excluded) once the Cabinet decision to which discussion papers relate has been made public, or, if not made public, when four years have passed since the decision.

The Information Commissioner presented evidence to the court showing that the government--almost immediately after the *Access to Information Act* was passed--stopped presenting discussion papers to Cabinet. Instead, it put the background, analysis and options material in the "analysis section" of the Memorandum to Cabinet. The government argued that, since this analysis section is not called a "discussion paper", its decision to exclude the material it contains, as a Cabinet confidence, cannot be questioned by the Commissioner or the Federal Court. To emphasize the point, the Clerk of the Privy Council, certified, pursuant to section 39 of the *Canada Evidence Act*, that the withheld records are Cabinet confidences and asserted that the certificate effectively ended the matter.

Justice Blanchard of the Federal Court, Trial Division, chafed at the government's view that it has an entirely free hand to roll any material it wishes behind the Cabinet confidence veil of secrecy. He concludes:

> "I support the findings of the Information Commissioner. Parliament intended that a certain type of information be released, and in my view, regardless of the title given to the information. If a document contains information the purpose of which is to provide background explanations, analysis of problems and policy options, Parliament meant for this information to be disclosed. This is the only interpretation of paragraphs 69(1)(b) and 69(3)(b) of the *Access to Information Act*, and paragraphs 39(2)(b) and 39(4)(b) of the *Canada Evidence Act*, which gives those sections any meaning. Understanding the meaning of "discussion paper", as a paper produced by a department as part of a planned communication strategy, is not provided for in the *Access to Information Act*. Transforming the "discussion paper" into the "analysis" section of the current Memorandum to Cabinet effectively limits access to background explanations, analysis of problems or policy options provided for in the *Access to Information Act*. Such a change to the Cabinet Paper System could be viewed as an attempt to circumvent the will of Parliament." (*Information Commissioner* v. *Minister of Environment*, Federal Court, Trial Division, 2001 FCT 277 at p. 26)

Over the 18 years since the *Access to Information Act* came into force, numerous instances have arisen where the government has certified information to be a Cabinet confidence when the information clearly does not so qualify. Occasionally, the Information Commissioner sees the information which has been so certified because the certification comes as a last resort after all efforts to justify an exemption have failed. In one current case, the Clerk of the Privy Council has certified as a Cabinet confidence all references in other records to the fact that a minister, acting in the capacity of member of Parliament, wrote to another minister on a matter of public concern.

The Commissioner expressed the view that the withheld information could not properly be considered "records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy". Before invoking this provision to exclude information, the Commissioner argued, the content of the discussions or communications must be at risk. The Clerk refused to reconsider, claiming that his decision to label information as a "Cabinet confidence" is not subject to independent review.

And, too, there have been cases--by far the rarer--where the Clerk has been prepared to remove a certification after receiving representations from the Commissioner. The point of all this being, that, in the absence of independent review, the Cabinet confidence exclusion is likely to be applied to a broader range of records than intended by Parliament. As Mr. Justice Evans said in *Canadian Council of Christian Charities* v. *Minister of Finance* (1999) YFC 245 at 255: "Heads of government institutions are apt to equate the public interest with the reasons for not disclosing information, and thus to interpret and apply the Act in a manner that gives maximum protection from disclosure for information in their possession."

In its report of the results of its review of the first three years of operation of the *Access to Information Act*, the Standing Committee on Justice and Solicitor General said:

"The Committee is strongly of the view that the absolute exclusion of Cabinet confidences from the ambit of the *Access to Information Act* and the *Privacy Act* cannot be justified. The Committee heard more testimony on the need to reform this provision than on any other issue. The exclusion of Cabinet records has undermined the credibility of the *Access to Information Act* and the *Privacy Act*. The then Minister of Justice, the Honourable John Crosbie, testified before the Committee as follows:

> "I think that in the past too much information was said to be covered by the principle of Cabinet confidence.—A lot of the information previously classified as a Cabinet confidence can and should be made available."

The Committee agrees."

(*Open and Shut: Enhancing the Right to Know and the Right to Privacy* March 1987, p. 31)

The litmus test of whether or not the government is serious about reforming the *Access to Information Act* will be its willingness to rectify what every independent analyst considers to be the law's greatest weakness--the exclusion of Cabinet confidences. By no means does reform mean abandonment of a degree of secrecy necessary to preserve the important convention of collective ministerial responsibility and the need to foster frank exchanges among ministers.

All independent analysts agree that records should not be disclosed if their content would reveal the substance of Cabinet deliberations. What is required is a happy medium. The Justice Committee Report of 1987 put it this way:

> "The Committee recognizes that there must be an exemption protecting certain Cabinet records; to a substantial degree, our Parliamentary system of government is predicated upon the free and frank discussion of matters of state behind closed doors. Nevertheless, the Committee believes that a suitably worded exemption--**not an exclusion**--would provide ample protection for Cabinet secrecy. In recognition of the special role that the Cabinet plays in our parliamentary system, no injury test should apply to information of this category." (*Open and Shut*, p. 31)

The Information Commissioner, too, advocates the transformation of the Cabinet confidence exclusion into an exemption and supports narrowing the scope of Cabinet secrecy by confining it to information which would reveal the deliberations of Cabinet. The detailed proposals in this regard are as follows:

(a) Exemption or exclusion

The current federal approach to exclude Cabinet confidences from access legislation is out of step with the purpose of the Act and with the approach taken in provincial jurisdictions.

Consequently the current exclusion for Cabinet confidences in section 69 of the *Access to Information Act* should be replaced by an exemption for Cabinet confidences, thus making these records subject to the access and independent review provisions of this Act.

(b) Mandatory or discretionary exemption

Most freedom of information laws view the vital nature of Cabinet confidentiality in a parliamentary form of government as meriting a strong mandatory exemption. The Standing Committee in its report, *Open and Shut*, suggested that the exemption for Cabinet confidences be discretionary. It is understandable that governments will be hesitant to weaken, to any significant degree, the protections for Cabinet confidences. If there is any likelihood of some change, the move to a mandatory exemption has more chance of acceptance. That would appear to be the lesson from provincial jurisdictions.

(c) Injury test

The inclusion of an injury test would not, understandably, be acceptable to government. Having to convince an impartial officer (such as the Information Commissioner or the court) that disclosure would cause injury would put the government in an unprecedented situation of explaining political aspects of Cabinet deliberations to judicial officers. The chances of reform are remote if the recommendation is to include an injury test.

(d) Nature of class test

If the exemption is not based on an injury test, then it must be based on a class test. The crucial question: what should be the nature of that class test? The current exclusion is based on the concept of protection of confidences of the Queen's Privy Council for Canada, which are then partially defined in the Act and policy as being comprised of various types of records and information within records. The policy goes further to define some records or parts of records (e.g., public summaries of Cabinet decisions and records not prepared solely for use by Cabinet but attached to Cabinet records) as not being confidences. There is no description of the essential interest which the exclusion is intended to serve and, hence, the exclusion is open-ended.

With the exception of the federal legislation in Australia, this approach has not been followed in other jurisdictions. The preferred approach is to focus more clearly on the purpose of the exemption, the protection of the substance of deliberations of Cabinet, as the basis of the test. The phrase "would reveal the substance of deliberations of the Cabinet" is sometimes accompanied by a non-inclusive list of generic types of records or information which would qualify for the exemption. This latter approach has some considerable merit:

- it focuses the exemption and narrows it to the specific interest which requires protection. It eliminates the need for lengthy definitions of types of records which may qualify for the exemption and illustrations of exceptions to general rules. In other words, it is simpler, yet protects the vast majority of records, currently defined in the PCO policy on *Release of confidences of the*

Queen's Privy Council for Canada, after its various exceptions are taken into account;

- it is more generic in character. As a result, would not suffer damage if PCO decides to alter the Cabinet papers process and the nature and types of records which are created;
- it does eliminate the need for government institutions to review and to sever from documents all simple references to Cabinet processes (e.g., RD numbers and TB numbers as is now the case). Such disparate references would only have to be removed when their disclosure would actually reveal the substance of Cabinet deliberations.

Consequently, the test for a Cabinet confidences exemption should be that the disclosure of a record would reveal the substance of deliberations of Cabinet.

(e) Definition of Cabinet

All current and proposed exemptions and exclusions for Cabinet confidences extend to the Cabinet and all its committees, formal and "ad hoc." Thus, there is no need to alter the scope of the parts of Cabinet which may have records prepared for them, submitted to them or have records created on their behalf which would qualify as Cabinet confidences and merit protection.

There is, thus, no need to change the current definition of the term "Council" in the *Access to Information Act*, which includes the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(f) Coverage of exemption

The current federal exclusion is more restrictive than any exemption found in provincial laws. The major differences in practice centre on access to background explanations and analyses after a decision has been made and on the time limit during which Cabinet confidences qualify for absolute protection.

The focus of any newly drafted exemption should be on records which are generated, or received by Cabinet members and officials while taking part in the collective process of making government decisions or formulating government policy. Generally, this includes:

- agendas, formal and informal minutes of Cabinet and Cabinet committees and records of decision;
- Cabinet memoranda or submissions (including drafts) and supporting materials;
- draft legislation and regulations;
- communications among ministers relating to matters before Cabinet or which are to be brought before Cabinet (including draft documents);
- memoranda by Cabinet officials for the purpose of providing advice to Cabinet (including draft documents);

- briefing materials prepared for ministers to allow them to take part in Cabinet discussions (including draft documents); and

- any records which contain information about the contents of the above categories, the disclosure of which would reveal the substances of the deliberations of Cabinet or one of its committees.

Examples should be included of types of records which "would reveal the substance of deliberations of Cabinet or one of its committees". The list, of course, should not be exhaustive so that the provision will be flexible in the face of future changes in the Cabinet papers system.

Thus, the exemption provision for Cabinet confidences should provide a non-inclusive, illustrative list of generic types of records which would qualify for protection.

The list of examples should be structured as follows:

(i) an agenda, minute or other record of the deliberations or decisions of Council or its committees;

(ii) a record containing recommendations submitted, or prepared for submission, to Council or its committees;

(iii) a record containing background explanations, analysis of problems or policy options for consideration by Council in making decisions;

(iv) a record used for or reflecting communications or discussions among Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(v) a record prepared for the purpose of briefing a minister of the Crown in relation to matters that are before, or are proposed to be brought, before Council or that are the subject of communications or discussions referred to in (iv) above;

(vi) draft legislation regulations; and

(vii) records that contain information about the contents of any record within the class of record referred to in paragraphs (i) to (vi) if the information will reveal the substance of the deliberations of Council.

(g) Splitting the protection of Cabinet confidences

The Australian FOI Act distinguishes between Cabinet and Executive Council documents and

- draft Cabinet submissions; and

- briefing material to a minister concerning a Cabinet submission.

These documents are treated under the exemption for internal working documents (clause 36) which determines whether a record can be considered, in whole or in part, to consist of advice and recommendations and whether access

is contrary to a public interest. This means that a government institution has discretion to decide whether such information should be released.

The Standing Committee thought there was duplication in the protection of memoranda which present recommendations to Cabinet and for briefing materials used to prepare ministers for Cabinet meetings. It found that the discretionary exemption for advice and recommendation in section 21 of the *Access to Information Act* provides adequate protection for the deliberative portions of these types of records.

While, at first glance, this may seem to be the case, it is also necessary to keep in mind the special nature of the protection necessary for the collective decision-making process of government. Other legislatures in Canada, when considering the nature of this protection, have seen fit to split the treatment of Cabinet confidences into two domains, one mandatory and the other discretionary. This does not mean that the advice and recommendations exemption will not come into play when a record does not or ceases to qualify as a Cabinet confidence. The splitting of the treatment of Cabinet confidences would appear, however, to complicate decision-making around an already difficult exemption. Any use of discretion should be applied in the exception criteria for a Cabinet confidences exemption.

(h) Exceptions to Cabinet confidences exemption

There are a number of exceptions to the Cabinet confidences exemption recognized in the access laws of other jurisdictions and in various proposals for legislative amendment. These are considered below and recommendations made about each.

(i) Time limits

Because of the class nature of all protection for Cabinet confidences, all other access statutes, except the Australian FOI Act, include a limit governing the period of time during which all or part of a record can be considered a Cabinet confidence. The original standard was 20 years (federal and Ontario). The federal Standing Committee recommended that the limit be reduced to 15 years, the length of time of a minimum of three Parliaments. This standard has now been adopted in British Columbia and Alberta.

The time limit for all or part of a record to be considered a Cabinet confidence should be reduced from 20 to 15 years.

(j) Background explanations, analysis of problems and policy options

In paragraph 69(3)(b) of the Act, Parliament directs that background explanations, analysis of problems and policy options presented to Cabinet should be subject to the right of access after the decisions to which they relate have been made public or, otherwise, after four years. Parliament's will in this regard was, in effect, thwarted in the intervening years, as discussed previously.

This exception for background explanations, analysis of problems and policy options is crucial in opening up the information which forms the general basis on which Cabinet acted, without exposing its deliberations. It is essential to promoting improved government accountability and helping to assure that officials provide to Cabinet the best information on which to base decisions--since this, after all, will become open to review and comment.

Given the history of resistance by governments to disclosing such information, the Act should be amended to make it crystal clear that background explanations, analysis of problems and policy options are subject to the right of access.

(k) Summary of decision

All governments summarize Cabinet decisions in order to communicate these to the public or allow government institutions to implement the directions of Cabinet. Not all such summaries are made available to the public in press releases or other similar public documents. Thus, there is a need to recognize that such summaries are not considered Cabinet confidences once they are severed from other information which may reveal the substances of deliberations of Cabinet or one of its committees. Such summaries (e.g., Treasury Board circulars implementing decisions relating a new policy or budget reduction) should be routinely available to the public.

(l) Cabinet as appeal body

From time to time, Cabinet or a Cabinet committee (e.g., Treasury Board) may serve as an appeal body, under a specific Act. It can be argued that, in such instances, the record of the decision, but not the advice and recommendations supporting it, should be publicly available. Often such decisions are communicated to the public. But there needs to be a general rule that such decisions are not to be treated as Cabinet confidences. Such a provision is made in both the British Columbia and Alberta FOI legislation.

(m) Disclosure with consent of Cabinet

There is a convention that the Prime Minister and former prime ministers control access to the Cabinet confidences of his or her administration. Ministers and former ministers control records relating to the making of government decisions or policy. The current federal policy provides discretion to the Cabinet or the Prime Minister to make a Cabinet confidence accessible to the public. The ministers concerned have discretion to disclose records used for, or reflecting communications or discussions, regarding the making of government decisions or formulating of government policy.

In Ontario, paragraph 12(2)(b) recognizes that the Executive Council may lift the designation of Cabinet confidence from a record which has been prepared under its auspices. This consent is not a regular or normal practice. The Information and Privacy Commissioner of that province has recommended its use in cases where proposals or draft legislation or regulations have been released to some parties for consultation but access has been denied others because the records fall within the Cabinet confidences exemption. The Commissioner believes that this inequality of access can be rectified through the

consent of the Executive Council. Other issues may arise where a Cabinet may wish to consent to the release of information qualifying as a confidence. The same requirements may occur for a minister or several ministers who have communicated over a government decision or formulation of policy. Since Cabinet, prime ministerial or ministerial consent does meet the current convention for the release of Cabinet confidences, it would seem appropriate to include a paragraph in the exceptions part of any proposed Cabinet confidences exemption which recognizes the process.

(n) Disclosure in the public interest

Disclosure in the public interest is a large and important access to information issue in and of its own right. It has become a feature of most modern access legislation in Canada and will have to be seriously considered in any reform of federal access legislation. Ontario was the first to include a more general "public interest override" in its freedom of information legislation. This override generally states that, despite any other provision of the Act, the head of a government institution must, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so. The disclosure requirement is extended to Cabinet confidences but the public interest is restricted to a record that reveals a grave environmental, health or safety hazard to the public. The Ontario legislation also provides for a specific public interest override of several of its exemption provisions but not for Cabinet confidences.

British Columbia and Alberta extend the basic Ontario provision by providing for the release of information in cases where there is risk of *significant* harm to the environment or to the health or safety of the public, of an affected group of people, of a person, of the applicant or if there is any other reason for which disclosure is clearly in the public interest. (British Columbia *Freedom of Information and Protection of Privacy Act*, section 25, and Alberta *Freedom of Information and Protection of Privacy Act*, section 31)

There are few rulings under provincial access laws relating to the release of information in the public interest. Those which do, apply to protection of the environment, public health and safety. None relate to the public interest in the disclosure of Cabinet confidences. The best that can be said is that the public interest override is not leading to a flood of Cabinet confidences being released. There is, then, some comfort for those who may see such provisions as a major threat to the confidentiality of the Cabinet decision-making processes.

At the same time, it is hard to support the non-release of information, Cabinet confidence or not, which relates to either *grave* or *significant* harm to the environment, public health or safety or the disclosure of which was otherwise clearly in the public interest. The tests remain quite high and information which would fall in such categories should most often be made public or communicated to affected groups or individuals without any resort to an access request.

Consequently any exemption for Cabinet confidences should be subject to a general public interest override provision, preferably a section similar to those

currently contained in the British Columbia and Alberta freedom of information and protection of privacy legislation.

(o) Restrictions on examination and review of Cabinet confidences

It is common to recognize the special character of Cabinet confidences by restricting the number and level of those independent agents of Parliament who can gain access to them and examine and make orders concerning questions of public access to them. This is a wise procedure to reduce intrusions upon the overall principle of confidentiality for the deliberations of Cabinet.

The nature of any review mechanism is dependent, however, on the overall review structure under a reformed *Access to Information Act*. If it were to remain unchanged, with the Commissioner carrying out an ombudsman's role for refusals of access, then the recommendations of the Standing Committee must be dealt with.

The Committee recommended that the refusal of access to Cabinet confidences should not be referred to the Information Commissioner but rather should be reviewed directly by the Associate Chief Justice of the Federal Court. Such a procedure would be exceedingly confrontational and expensive, as well as place a very heavy workload on the Associate Chief Justice. There would seem to be merit in empowering the Commissioner to investigate this type of refusal of access as is done in all other cases. The Information Commissioner should be bound, however, to restrict his or her delegation of powers of investigation, as is now the case for specific provisions relating to international affairs and defence under subsection 59(2) of the *Access to Information Act*. If an appeal is made to the Federal Court, it should be heard by the Associate Chief Justice as is also required under section 52 for matters of international affairs and defence.

(p) Suggested exemption provision for Cabinet confidences

An amended exemption for Cabinet confidences reflecting the recommendations in this chapter, would read as follows:

1. The head of a government institution shall refuse to disclose any record the disclosure of which could reasonably be expected to reveal the substance of deliberations of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

(a) an agenda, minute or other record of the deliberations or decisions of Council or its committees;

(b) a record containing recommendations submitted, or prepared for submission, to Council or its committees;

(c) a record containing background information, analysis of problems or policy options presented to Council for consideration in making decisions;

(d) a record used for or reflecting the content of communications or discussions among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared for the purpose of briefing a minister of the Crown in relation to matters that are before, or are proposed to be brought, before Council or that are the subject of communications or discussions referred to in (c) above;

(f) draft policy or regulations; and

(g) records that contain information about the contents of any record within the class of record referred to in paragraphs (a) to (e) if the information reveals the substance of the deliberations of Council.

2. Subsection (1) does not apply to:

(a) a record that has been in existence for 15 or more years;

(b) a record or part of a record which is a record of a decision made by Council on an appeal under an Act of Canada;

(c) a record or part of a record, which contains background explanations, analyses of problems or policy options, submitted, or prepared for submission, to Council or its committees for their consideration in making a decision if:

(i) the decision has been made public;

(ii) four years or more have passed since the decision was made or considered;

(d) a record attached to a Cabinet submission which was not brought into existence for the purpose of submission for consideration by Cabinet or one of its committees;

(e) a record or part of a record which contains a summary of a Cabinet decision exclusive of any information which would reveal the substance of deliberations of Council;

(f) any record or part of a record where the Cabinet for which, or in respect of which, the record has been prepared consents to access being given.

3. For purposes of subsections (1) and (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

ii) Plugging Gaps in the Act's Coverage

The *Access to Information Act* applies only to institutions listed in Schedule I of the Act. There is no general principle dictating which institutions must be added to the schedule. The Cabinet has the authority to add to, but not subtract from, the schedule but it is not obliged to make additions to the schedule. This régime has resulted in an obsolete Schedule I wherein are listed institutions which no longer exist and from which are missing some institutions which are normally understood to be part of the federal governance apparatus.

The better approach would be to articulate in the law the criteria for inclusion in the Act's Schedule I and require Cabinet to add any qualified institution to the Schedule. Too much uncertainty would be introduced into the system by doing away with the schedule altogether. Institutions, especially new forms of enterprises engaged in public functions, need to know with certainty whether or not they are covered by the law; they deserve an avenue by which to challenge inclusion and the public deserves an avenue to challenge Cabinet's failure to include an institution in the Act's schedule.

The mechanism which is recommended is this: Cabinet should be placed under a mandatory obligation to add qualified institutions to Schedule I of the Act. Any person (including legal person) should have the right to complain to the Information Commissioner, with a right of subsequent review to the Federal Court, about the presence or absence of an institution on the Act's Schedule I. As at present, the Commissioner should have authority to recommend addition to or removal from the Schedule and the Federal Court, after a de novo review, should have authority to order that an institution be added to or removed from the Schedule.

Professor Alasdair Roberts, of Queen's University, has written thoughtfully about how freedom of information laws, traditionally designed to respect the public sector / private sector split, are becoming less and less effective. He reports that there is little consensus on how to deal with this problem; a variety of approaches have been adopted in jurisdictions with freedom of information laws. Here are some of the options:

- any organization would be covered that undertakes important public functions, whether it is publicly or privately owned;
- any organization would be covered which exercises "functions of a public nature" or which provides under contract with a public authority "any service whose provision is a function of that authority";
- any organization would be covered whose activities raise the prospect of an abuse of power; and
- any organization would be covered if failure to do so would have an adverse effect on the fundamental interests of citizens.

The clear challenge for Canada is to find criteria for determining coverage of the Act which are as objective as possible so as to make them clearly understood and facilitate their application in specific cases. **To that end, it is recommended that any institution, body, office or other legal entity be added to Schedule I of the *Access to Information Act*** if it meets one or more of the following six conditions:

1) it is funded in whole or in part from parliamentary appropriations or is an administrative component of the institution of Parliament;

2) it or its parent is owned (wholly or majority interest) by the Government of Canada;

3) it is listed in Schedule I, I.1, II or III of the *Financial Administration Act*;

4) it or its parent is directed or managed by one or more persons appointed pursuant to federal statute;

5) it performs functions or provides services pursuant to federal statute or regulation; or

6) it performs functions or provides services in an area of federal jurisdiction which are essential in the public interest as it relates to health, safety, protection of the environment or economic security.

It is, of course, not possible to predict with certainty the forms of institutional arrangements which will arise in future, through which functions of governance will be exercised. In recent years, air traffic control services have been moved from a government department, where they were subject to the right of access, to a private corporation, where they are not covered. In future years, there may be changes in the way governments manage corrections, drug approvals, grants and contributions, policing, emergency response measures--the list goes on. Accountability through transparency should not be lost merely because the modality of service provision has changed. The proposed criteria for inclusion are intended to be objective, yet flexible enough to be useful guides for the future.

Under the above-described criteria for inclusion, examples of institutions not now listed in the Act's Schedule I which would be added, include:

The House of Commons and its components

The Senate and its components

The Library of Parliament

The Chief Electoral Officer

The Information Commissioner

The Privacy Commissioner

The Commissioner of Official Languages

The Auditor General

The Canadian Broadcasting Corporation

Canada Post Corporation

Canadian National Railways

Atomic Energy of Canada Limited

Navcan

The Canadian Blood Service

The Canadian Wheat Board

The St. Lawrence Seaway Corporation

The Canada Pension Plan Investment Board

The Export Development Corporation

It is important to note that the criteria set out above would also capture offices of MPs and senators as well as the Supreme Court, Federal Court and Tax Court. In its 1987 report, the Justice Committee recommended that these bodies be explicitly excluded from the coverage of the Act. Former Information Commissioner, John Grace, did not recommend coverage of these bodies in the proposals for reform he tabled in Parliament in 1994.

There is wisdom in the view that the judicial branch of government, which must adjudicate complaints under the *Access to Information Act* and make binding orders thereon (unlike the Commissioner who is called on to investigate and recommend), should not itself be subject to the Act's requirements, nor to the investigative jurisdiction of the Information Commissioner. More importantly, by convention and constitution, court proceedings are open to the public to a much greater degree than are the activities of other institutions of governance.

As well, there is wisdom in the view that the offices of MPs and Senators should not be covered by the law. Their role in governance is mediated through the institutions of party and Parliament. Their decisions and actions do not cry out for accountability in the same way as do those of government ministers or the various institutions of Parliament of which individual members are part.

Consequently, it is recommended that the Act include a specific exclusion from its coverage for the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada and for the offices of members of Parliament and Senators.

Two further requirements will be necessary to prevent records from "leaking" out of institutions covered by the Act into those which are not. First, the most common way this occurs is for an institution which is covered to contract out a particular function (for example an harassment investigation or a managerial review or a strategic plan) and to provide that all records relevant to the contracted activity (except, of course, the deliverable) will be kept in the possession of the contractor.

To counteract this practice, the *Access to Information Act* should deem that all contracts entered into by scheduled institutions contain a clause retaining control over all records generated pursuant to service contracts.

Second, institutions have sought to limit the scope of access by arguing that records held in ministers' offices or in the office of the Prime Minister, are not subject to the right of access. As of this writing there is litigation in the Federal Court wherein the Crown is asserting this restrictive interpretation of the Act. The Act should be amended to end the uncertainty by making it clear that the geography of where a record is held is not determinative of whether or not the record is subject to the right of access. **In particular, the right of access in section 4 should explicitly state that it includes any records held in the offices of ministers and the Prime Minister which relate to matters falling within the ministers' or Prime Minister's duties as heads of the departments over which they preside.**

iii) Slipping Away Below Radar - Section 24

Former Information Commissioner, John Grace, called section 24 of the Act the "nasty little secret of our access legislation" (1993-94 Annual Report pages 31-32). By that description, he was referring to the fact that section 24 allows the government to keep information secret even when there may be no reasonable justification for secrecy. He noted that even confidences of the Queen's Privy Council receive absolute protection for only 20 years. Yet records covered by section 24 are accorded mandatory secrecy forever. The section reads as follows:

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

In order to add or delete provisions from Schedule II, the Schedule must be amended by Parliament. This whittling away of the right of access occurs largely unnoticed in the back pages of other legislation as a "consequential amendment" to the *Access to Information Act*.

Since section 24 is a mandatory exemption and one which does not require a reasonable likelihood of injury before being invoked, Parliament required that its use should be carefully monitored. For that reason, subsection 24(2) requires that each statute contained in Schedule II be reviewed by Parliament at the same time as the general review prescribed by subsection 75(2). This review was carried out in 1986 by the Justice and Solicitor General Committee.

In its report of June 1, 1986, the Committee noted that the spirit of the *Access to Information Act* was articulated in subsection 2(1) which provides as follows:

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

The Committee concluded that two of the three principles set out in this clause are violated to some degree by the existence of section 24. First, it said, to the extent that many of the statutory provisions in Schedule II contain a broad discretion to disclose records yet fall within the mandatory prohibition in section 24, the exception to the right of access cannot be termed "limited and specific". Second, the Committee also noted that, since the scope of the Commissioner's review of government decisions to withhold records under this exemption is limited simply to a determination of whether the disclosure is subject to some other statutory restriction, there can hardly be a full independent review.

After reviewing the history and purpose of section 24, the nature of the information listed in Schedule II and hearing witnesses in the matter, the Committee concluded as follows:

> "We have concluded that, in general, it is not necessary to include Schedule II in the Act. We are of the view that, in every instance, the type of information safeguarded in an enumerated provision would be adequately protected by one or more of the exemptions already contained in the *Access to Information Act*." (*Open and Shut*, p. 116)

The Committee demured, with respect to three statutes, in the following terms:

> "Despite our view that the interests protected by the Schedule II provisions could adequately be protected by other existing exemptions in the *Access to Information Act*, we are persuaded that there should be three exceptions to the conclusion. The sections of the *Income Tax Act*, the *Statistics Act* and the *Corporations and Labour Unions Returns Act* which are currently listed in the Schedule deal with income tax records and information supplied by individuals, corporations and labour unions for statistical purposes. Even though the exemptions in the *Access to Information Act* afford adequate protection for these kinds of information, the Committee agrees that it is vital for agencies such as Statistics Canada to be able to assure those persons supplying data that absolute confidentiality will be forthcoming. A similar case has been made for income tax information."

Consequently, the Committee recommended that section 24 and Schedule II be repealed and replaced with new provisions which would incorporate and continue to protect the special interests contained in the *Income Tax Act*, the *Statistics Act* and the *Corporations and Labour Unions Returns Act*. It also recommended that the Department of Justice undertake an extensive review of the remaining statutory restrictions in Schedule II and amend their parent acts in a manner consistent with the *Access to Information Act*.

It would seem that the Committee's wise advice has fallen on deaf ears, as the statistics illustrate. When the *Access to Information Act* was proclaimed in 1983, the 33 statutes listed in Schedule II contained, among them, some 40 separate provisions restricting disclosure in some way. Three years later, at the time of the Parliamentary Review in June of 1986, the number had grown to 38 statutes incorporating 47 specific confidentiality provisions. As of December 31, 2000, that list has grown to 52 statutes, with 66 particular provisions which affect the confidentiality of records.

These "by the back door" derogations from access rights are as troubling to the Commissioner as they were to the Justice Committee. When Parliament adopted the right of access to government records, it included a very important phrase: "notwithstanding any other Act of Parliament" (section 4). The continuing growth of Schedule II now threatens to erase the vital constraint on creeping secrecy which those six words originally gave.

There being no doubt that the Act's existing exemptions afford adequate protection for all legitimate secrets, it is time to abolish section 24.

iv) Strong Medicine for Delays

Since the beginning, users of the *Access to Information Act* have complained about chronic and long delays in receiving answers. This despite the fact that Parliament explicitly stated, in subsection 10(3), the principle that access delayed is access denied. That provision states:

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

There is no penalty in the Act for failure to respect the mandatory legal obligation to respond to an access request within 30 days (or within a validly extended response period). Consequently, many departments adopted early on--and to this day--a "we'll do our best" response period.

Complaints about delay--even after 17 years of trying--comprise some 50 percent of the complaints made to the Information Commissioner. Several major recipients of access requests consistently get failing grades on the Commissioner's delay "report cards". (For details on this year's report cards and the current delay situation, see Chapter IV, pages 85 to 91) [2000-01 Annual Report]. This situation is the Act's "silent, festering scandal"--to borrow a phrase from a former Commissioner.

In its 1987 report, the Standing Committee on Justice and Solicitor General recommended that the Treasury Board, in conjunction with the Public Service Commission, investigate methods for enhancing timely compliance with the *Access to Information Act*. The problem, even then, was of such concern to the Committee that it asked for the investigation to commence immediately and that its results be submitted to the Justice Committee within one year.

The Treasury Board ignored the recommendation, did not investigate methods to solve the problem, did not report back to the Committee. To this day, no such investigation has been undertaken by the Treasury Board--at least to the knowledge of this Commissioner. One must bear in mind that it is the President of the Treasury Board who is designated as the minister responsible for the good administration of the Act across government.

It is almost unprecedented to be in a position of seeking ways to "encourage" public officials to obey mandatory legal obligations. Just think about the implications. Yet that is where the Justice Committee found itself in 1987 and where we find ourselves in 2001.

Except for its recommendation that Treasury Board study the matter, the only other delay-related recommendation made by the Committee was to make a statutory connection between the timeliness of answers and the collection of fees. In particular, the Committee recommended that the Information Commissioner be given the power to make an order waiving all access fees in cases of unjustified delay.

In his 1993-94 recommendations for reform, former Information Commissioner Grace endorsed the view that the right to collect fees should be lost when answers are unjustifiably delayed. He entered this caveat: "This sanction, admittedly, would be largely symbolic because large fees are seldom collected from requesters. But it is a start. There is no reason requesters should pay anything for poor service." Mr. Grace went on to propose a more "mind-focussing" sanction, being to prohibit government from relying upon certain of the Act's exemption provisions in late responses. In that proposal, the government could only invoke exemptions 13, 17, 19 and 20 to withhold records in late responses. Those provisions protect confidential foreign or provincial records, personal safety and privacy and confidential, third-party information.

There is some question as to whether this proposal would be workable. Several provisions which government would be precluded from invoking contain injury tests and, if those tests are met, surely the information merits protection even if the answer is late. The idea behind this "sanction" is a good one. It would have every bit as much force, without risking highly damaging disclosure, if it were restricted to loss of the ability to invoke sections 21 (internal advice) and 23 (solicitor-client) in late responses. These two sections are discretionary and protect the internal, advice-giving process. A sanction so limited would pinch where the pinch is needed.

Consequently it is recommended that the Act be amended to preclude reliance upon sections 21 and 23 in late responses.

This "strong medicine" for late responses is only justifiable if government institutions are given a reasonable response-time régime to work within. In 1999-2000, government institutions were able to meet that deadline in 63 percent of cases. The Standing Committee on Justice and Solicitor General recommended, in 1987, that the response period be shortened to 20 days. However, access requests are becoming increasingly complex and sophisticated, and volumes are up significantly over 1987 levels. There appears to be no system-wide reason for increasing--or decreasing--the current 30-day response deadline.

However, concerns have been raised with respect to the extension of time provisions in the Act. Requesters frequently choose to submit a large number of individual requests on the same subject (perhaps broken up by time periods) rather than one comprehensive request. They do so, despite the additional application fees involved, in order to take advantage of the five free hours of search time included with *each* access request.

This approach does not, however, reduce the department's burden of work to respond, yet it may restrict the department's legal entitlement to avail itself of an extension of time. For example, no single request in the group may involve a large volume of records, hence, no extension pursuant to paragraph 9(1)(a) of the Act would be permitted. Whereas, if the group of requests were considered as a unit, the "large volume" criteria might be met.

This defect in the extension régime should be remedied by permitting a government institution, for the purposes of paragraph 9(1)(a) of the Act, to

group all requests received from a requester (within 30 days of receipt of the initial request) on the same subject matter.

When grouping has been employed for the purposes of paragraph 9(1)(a), it is appropriate that the requester be so informed in the extension notice.

While the extension provision deserves broadening in the manner set out above, its open-ended nature should also be addressed. As it stands, when extensions are permitted, they may be taken for a duration of time which is "reasonable--having regard to the circumstances." (subsection 9(1)) When one considers that a complaint to the Information Commissioner must be made within one year from the date the request is received, the right of complaint may be effectively denied through the use of the extension power. This defect, too, calls for a remedy.

It is recommended that section 9 be amended to provide that no extension of time may exceed one year without the approval of the Information Commissioner. Further, it is recommended that section 31 be amended, to give the Commissioner discretion to extend the one-year period within which a complaint must be made.

There is one further measure which would assist Parliament and the public in identifying the government institutions which fail to respect their response-time obligations. Section 72 of the Act requires the head of every government institution to report to Parliament every year on the administration of the *Access to Information Act* within his or her institution. Those reports are permanently referred to the Standing Committee on Justice and Human Rights. The Act is silent on what those reports should contain. Treasury Board has issued guidelines as to what should be contained in such reports but it does not ask institutions to grade their own performance in meeting response deadlines.

It is recommended, therefore, that section 72 be amended to require government institutions to report each year the percentage of access requests received which were in "deemed refusal" at the time of the response and to provide an explanation of the reasons for any substandard performance. In other words, by statute, all institutions should be required to provide Parliament with a "report card" similar to that which the Commissioner has provided on selected institutions over the past several years.

v) Recognizing, Fostering and Protecting the Coordinators

Since the Act's beginning, every government institution has managed the intake, processing, and responding to access (and privacy) requests through an official known as the Access to Information and Privacy (ATIP) Coordinator. That is, however, where the uniformity ends. Some coordinators are full-time, some part-time; some are senior, some are junior; some are empowered to apply exemptions, some merely prepare the files for others to decide; some have direct access to deputy ministers, some do not; some are encouraged to be the "information rights" conscience for their institution, some are encouraged to apply the access law in the most restrictive fashion.

All ATIP coordinators, on occasion, experience an uncomfortable conflict between their responsibilities under the *Access to Information Act* and their career prospects within their institution. This troubling reality was recognized by the Justice Committee during its three-year review. Treasury Board, too, remarked on this difficulty after reviewing responses given by coordinators in 1986 to a survey on their roles and job satisfaction. The study found:

> "In general, coordinators felt that there is a need for senior government officials to come to grips with the reality of Access and Privacy legislation, and to recognize that this represents a fundamental change in the conduct of public affairs affecting all stages in the treatment of government information, from creation to disposal, with implications well beyond the administrative processing of requests." (Review of Access to Information and Privacy Coordination in Government Institutions, 1986 Treasury Board Secretariat)

Despite the central, indispensible role of ATIP coordinators in the system--transforming black letter rights into a real service--they do not even get a mention in the *Access to Information Act*. In paragraph 5(1)(d) of the Act, the President of Treasury Board is required to publish a catalogue of institutions covered by the Act together with a description of their information holdings. In that catalogue--now called INFO SOURCE--there must be included: "the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent". That is the closest the Act comes to recognizing the role of the ATIP coordinator. To make matters worse, if one consults INFO SOURCE, none of the individual listings make reference to the ATIP coordinator. Only in the "useful terms" section at the beginning of the publication will one see reference to the ATIP coordinator as follows:

> "**Access to Information and Privacy Coordinator**. Each federal government department or agency has an Access to Information and Privacy Coordinator. The coordinators' offices are staffed by people who can answer questions and help you identify the records you wish to see. The coordinators may be contacted in person, by telephone or by letter. If you send a letter, include as much information as you can to help the staff locate the records you want and send you a reply as soon as possible." (*Info Source*, 2000-2001, p. 3)

In 1987, the Justice Committee believed that the time was long past due to professionalize the role of ATIP coordinators, to classify them as part of departmental senior management group, make them a part of departmental executive committees, give them direct reporting relationships with deputy heads of departments, develop a uniform set of job descriptions and set of expectations for them, ensure that they have completed standard, formal training in their discipline and surround them with a leadership culture which does not penalize them for making the access law effective within their institutions.

Those wise recommendations were not followed. In almost every annual report of this and previous Information Commissioners since the Act's coming into force, the impossible, thankless role of the ATIP coordinator has been brought to the government's attention. In 1998, then Commissioner Grace proposed a professional code of conduct for ATIP coordinators and urged Justice Canada, Treasury Board Secretariat, users of the Act and coordinators to work together in finalizing and adopting such a code. With the exception of the coordinators' own initiative in organizing the Canadian Access and Privacy Association (CAPA) as a mechanism for sharing information, ideas and concerns and for providing education and training through conferences and seminars, little has been done over the years to address the needs and concerns of these officials. Parliament could, and should, nudge the process along.

To that end, it is recommended as follows:

- **The Act include a definition of "access to information coordinator" as:**

  "Access to Information Coordinator" means the officer of a government institution identified pursuant to paragraph 5(1)(d) and delegated pursuant to section 73 to receive, process and answer requests under this Act for access to records."

- **Section 73 be amended to read as follows:**

  "The head of a government institution may, by order, designate one senior officer, having direct reporting access to the head or deputy head of the institution, as the institution's Access to Information Coordinator and may delegate to that official and to others for the purpose of assisting that official, the authority to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order."

- **A new section, 73.1, be added as follows:**

  s. 73.1(1) – It is the Access to Information Coordinator's duty to respect the letter and purpose of this Act, and to discharge this duty fairly and impartially.

  (2) – The Access to Information Coordinator shall promptly report to the head or deputy head of the institution any instance which comes to his or her knowledge, involving interference with rights or failure to discharge obligations, set out in this Act.

  (3) – The Access to Information Coordinator shall take all reasonable precautions not to disclose the identity of an access requester, the reason for a request or the intended use of requested information except:

  i) to the extent reasonably necessary for the proper processing of the access application;

  ii) with the consent of the requester; or

  iii) if disclosure is permitted by section 8 of the *Privacy Act*.

Access to Information Coordinators may, at any time, seek the independent advice of the Information Commissioner concerning compliance with this section and no coordinator may be penalized in any way for so doing.

PART B - LEGISLATIVE TUNE-UP

While the Act has served well in enshrining the right to know, it has also come to express a single-request, often confrontational approach to providing information--an approach which is too slow and cumbersome for an information society. The legal advances made by the legislation should, of course, be preserved as the ultimate guarantee of information access for the citizen. But, those principles should now be buttressed by new measures that acknowledge the broader importance and role of federal government information in Canadian society.

To that end it is recommended that there be a single minister, preferably the President of the Treasury Board, to be responsible for the *Access to Information Act*--all of it, its administration and policy.

To make the bureaucracy reflect the new leadership, it would make sense to sever the Information Law section of the Department of Justice from its present department (and from its inherent conflict-of-interest) and merge it with the Information, Communications and Security Policy Division of the Treasury Board Secretariat. This expanded unit would provide a locus of real leadership on information policy to public officials and practical advice to the community of access coordinators. Most important, this unit would be a much-needed counterweight to the powerful, yet heavily legalistic, influence which Justice, in its legal advisory role, exerts over all departments.

Government information as a national resource

The great lesson to be drawn from the access law's first 18 years of life is clear: to enhance open and accountable government, the *Access to Information Act* must become more than the mechanism by which individual access requests are made and answered. To accomplish this, three essential principles should be enshrined in law. These are:

1. **Government information should be generated, preserved and administered as a national resource.**

2. **Government should be obliged to help the public gain access to its national information resource.**

3. **Government information should be readily accessible to all without unreasonable barriers of cost, time, format or rules of secrecy.**

Broadening the access law in these three ways would make Canada's national information policy compatible with the public's right to know. **To reflect this important goal, an appropriate new name for the Act would be the *National Information Act, Open Government Act,* or the *Freedom of Information Act*.**

Creating the records: their care and safekeeping

To accept the notion that government information is a national resource is to acknowledge its value. To acknowledge its value is to see the need to ensure its creation and to safeguard it.

Implementing the first principle calls for new, clear and comprehensive rules for the creation and safekeeping of information. These rules would rebuke the disdainful practice of some officials who discourage the creation and safekeeping of important records in order to avoid the rigors of openness.

As discussed in detail in Chapter II, it is time for the passage of information management legislation and to impose, among other duties, the duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures, and transactions. A duty to create records has been imposed on the United States federal government by the *Federal Records Act*.

Among important records not now kept in an easily accessible form are copies of documents released under the access law. That should change. **All government institutions should be required to maintain a public register containing all records which have been released under the access law.** Why should departments duplicate their efforts and why should subsequent requesters have to wait unnecessarily, and pay again, for information which someone has already received? **As well, government institutions should maintain a current, public register of all public opinion surveys, which surveys should be disclosed on request without application of exemptions under the Act.**

Creating pathways to information

The national information resource is vast; so vast that without a navigation system it will be of little use to the public. Open and accountable government requires public pathways to information and more. It requires that government actively disseminate some information. **There should be an obligation on government to release routinely information which describes institutional organizations, activities, programs, meetings, systems of information holdings and which inform the public how to gain access to these information resources. This obligation to disseminate should extend also to all information which will assist the public in exercising its rights and obligations, as well as understanding those of government.**

Eliminating barriers to access price barriers

To eliminate a developing price barrier, the existing distinction between records which can be purchased, to which there is now no right of access, and other records to which the Act applies, should be modified. **In particular, paragraph 68(a) should be amended to ensure that only information which is reasonably priced and reasonably accessible to the public is excluded from the access law.** Such a change would prevent the establishment of distribution arrangements that interfere with the availability of government information on a timely and equitable basis. As well, it would ensure that fees and royalties for government information are reasonable.

Of course, a call for reasonable fees is platitudinous and begs the question: what level of fees is reasonable for access under the Act and for information disseminated outside the Act?

At their current levels and as currently administered, fees for requests under the Act seem designed to accomplish one purpose--and one purpose only: to discourage frivolous or abusive access requests. The fee system is not designed to generate revenue for governments or even as a means of recovering the costs of processing access requests. That is not an acceptable premise on which to build a right of access.

Rather, it should be made explicit in the Act, as it is in the Ontario and British Columbia Acts, that departments may refuse to respond to frivolous or abusive requests--subject to an appeal to the Information Commissioner. Better to face this issue head on than penalize all requesters through the fee system. To avoid the real risk that this provision could be used by departments as a delaying tactic, when the Commissioner reviews a complaint that a department refused access on that basis, the Commissioner's ruling should be binding and final.

Once that change has been made, there is no longer any compelling argument for retaining the $5 application fee. The only approved charges should be market-rate reproduction costs (i.e., for paper copies, diskette tapes, audio/video tapes or copies in any other format) and the present $10 per hour search and preparation charge. In the spirit of openness, it would seem reasonable to retain the period of the five hours' search time included with each access request.

While there have been recurring rumblings over the years about the government's intention to raise access charges, it is simply wrong for government to seek to generate more revenues from the administration of the access law. The annual cost of administration is some $20 million by a generous estimate. That is a bargain for such an essential tool of public accountability. The law pays for itself in more professional, ethical and careful behaviour on the part of public officials who must now conduct public business in the open. Excessive fees discourage use of the law and, in the long run, that is too high a cost.

Yet, some users of the access law are professional information brokers. They make large numbers of requests for large numbers of records, then resell the information for profit. A separate way of dealing with these commercial requesters is justifiable. When requests are from information resellers, government should be allowed to levy fees that approximate the actual cost of producing the information.

Even in these cases, however, price should not become an unreasonable barrier, either by wrongly defining requesters as commercial clients or by setting fees too high.

The decision to treat a request as a commercial request should be subject to review by the Information Commissioner. So, too, fees to be charged to a commercial requester should be reviewable. In these situations, to guard against delaying tactics, the Commissioner's decision should be binding and final.

The Standing Committee in 1987 made an extensive recommendation to incorporate fee waivers into the Act. The governments of Ontario and British Columbia have dealt with fee waiver specifically in their legislation. The Committee's criteria are sensible. They suggest that departments be required to consider whether:

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

The *Government Communications Policy* also sets out useful waiver criteria:

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

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

The Ontario legislation adds another wrinkle. It asks departments to consider "whether the payment will cause a financial hardship for the person requesting the record".

All this to say that what appeared novel and difficult to prescribe in law in 1982 is now run-of-the-mill and should be incorporated into the access law.

Finally on the issue of fees, it is important to note that the current fees in the regulations for computer-related charges do not reflect current realities. They provide:

7(1) Subject to subsection 11(6) of the Act, a person who makes a request for access to a record shall pay

(a) an application fee of $5 at the time the request is made; and (b) where applicable, a fee for reproduction of the record or part thereof to be calculated in the following manner:

(vi) for magnetic tape-to-tape duplication, $25 per 731.5 m reel.

(3) Where the record requested pursuant to subsection (1) is produced from a machine-readable record, the head of the government institution may, in addition to any other fees, require payment for the cost of production and programming calculated in the following manner:

(a) $16.50 per minute for the cost of the central processor and all locally attached devices; and

(b) $5 per person per quarter hour for time spent on programming a computer.

The idea that producing a report from a database is tantamount to programming a computer is outdated. Current technology, available at a modest cost, can easily produce a variety of reports from a single database. As well, charging for central processing time was reasonable when processing capacity was a scarce resource. Mainframe computers were very costly to purchase. Charging for processing time was one way to amortize their cost. The same reasoning does not apply to much less costly personal computers.

Better performance capabilities and lower costs of PC-based networked computing means that the real machine time cost is next to nothing. While a charge of $16.50 for each minute of central processor time may be appropriate for mainframe computing, it can hardly be justified for networked personal computers. **The regulations of the Act should be amended to exclude PC-based processing from the central processing fee.**

A second pricing issue involves fees to be charged for such new ways of distributing information as CD-ROMs and computer printouts. These media are not covered by the current fee schedule. The fee schedule clearly intends to limit the cost to the requester to the cost of compiling and reproducing the information. The same pricing philosophy should be maintained for new media formats.

The format barrier

Computer and database technologies and structures raise a fundamental question: Can computer-stored information be thought of at all in terms of discrete records? While the title of the *Access to Information Act* refers to information, the purposive section of the Act sets out a distinct limitation on its scope:

"2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information **in records** under the control of a government institution..."

The Act in section 2 defines a record as: "...any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof."

As database technology evolves, the parallels with paper records become ever more remote. Databases have come to resemble pools of information rather than collections of discrete documents. A record may result from the synthesis of information retrieved from several files--information conjured up only to dissolve again on command. As such, a specific record may not be created until a request is made and the software associated with the database compiles the information. But to exclude such information from the scope of the Act would be inconsistent with its purpose.

The right of access to records set out in section 4 of the Act should be amended to offer a right of access to "recorded information". Whenever the term record appears in the Act, including in the definition section, the term recorded information should be substituted. **To add clarity to the definition of recorded information, the present definition should be expanded to include voice-mail, e-mail, computer conferencing and other electronically stored communications.**

Acknowledging that government information is recorded in many forms, the right of access should include a right to receive information in the format most useful to the requester. While paper copy remains the most accessible and commonly-used format, other formats should be available whenever they exist or can be created with a reasonable amount of effort and at reasonable cost.

The *Access to Information Act* and regulations give little guidance on the matter of the format in which information is to be released. The Act does allow a requester to ask for information in either of the official languages. It also gives visually impaired individuals the right to information in alternate formats--in large print, braille or in audio-cassette. Regulations set the price of diskette copies as well as for the alternate formats. The Act and regulations do not, however, mention the conversion of data from one format into another.

If requesters are asked to pay for these conversions (which can often be done simply and automatically), will subsequent requesters have to pay again? Or will a department, having accomplished the conversion once, be required to maintain the data in the converted format for future requests? Would documents printed on demand from an electronic record be held in anticipation of a future request? No regulations are in place to govern on-line or remote access to electronic information.

The Act should be amended to give a requester the right to request information in a particular format. Departments should be allowed to deny the request on reasonable grounds, but any refusal should be subject to review by the Information Commissioner.

The exemption barrier

Some critics of the access law have received attention by arguing that the Act is more about secrecy than openness because of its multitude of exemptions. The current exemptions are the result of a careful balancing of a variety of interests achieved while the Act was being drafted and debated in Parliament between 1979 and 1982. While this is far from making the Act a secrecy act, there is no doubt that some of the so-called secrecy rules have proved in practice to be unnecessarily broad and inflexible. Some changes are required to reduce barriers to access and to ensure that those pessimistic characterizations of the law do not become pervasive.

A brief explanation of what now exists: Some exemptions are discretionary while others are mandatory; some include an injury test, others do not. If a record, or part of a record, comes within a specified exemption, then a government institution may be justified, or in some cases be required, to withhold all or part of the information.

A government institution is required to tell requesters, in general terms, the statutory ground for refusing a record or what the ground would be if the record existed. Currently, an institution is not required to confirm whether a particular record in fact exists, since such disclosure may, in and of itself, give valuable exemptible information. An institution must sever exemptible portions of records and provide access to the rest.

So much for what exists. Exemptions are difficult creatures to draft. It is even more difficult to obtain a consensus on what they should be. Thus, it is with some trepidation that changes are suggested. Nevertheless, after 18 years of experience, it is clear that some change is overdue to ensure that the law's purpose is better served.

Discretion and injury

The Standing Committee on Justice and Solicitor General made only one general recommendation concerning exemptions:

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

With the exception of section 19 (the personal privacy exemption) and, possibly, section 13 (the confidences of other governments exemption), the Committee's recommendation is a sensible way to promote more open and accountable government. It does not seem necessary, however, to put an onus on government to demonstrate significant injury from disclosure.

In similar legislation, the governments of Ontario, Quebec and British Columbia do not attempt to qualify the degree of injury that must be reasonably expected to occur. It is preferable to allow the seriousness of the injury to be one of the factors taken into account when discretion is exercised to invoke an exemption.

As for the personal privacy exemption, making it discretionary and subject to an injury test would radically alter the current balance between the *Access to Information Act* and the *Privacy Act*. That would be a mistake. Section 19 of the *Access to Information Act* is a mandatory, class exemption for the simple reason that it was Parliament's intent to make any public disclosure of personal information subject to the régime of the *Privacy Act*. The section does permit the head of an institution some discretion, but it is coincident with the privacy law. Admittedly, this is a different approach to that taken elsewhere.

In the United States, release of personal information under the *Freedom of Information Act* is subject to a test to determine whether disclosure would constitute a "clearly unwarranted invasion of privacy". In Ontario, access and privacy provisions are combined in a single statute which permits disclosure of personal information when there is no "unjustified invasion of personal privacy". British Columbia has a similar structure, but its test is an "unreasonable invasion of personal privacy".

It is far from clear that these are better approaches to balancing the right to privacy with the right to know what government is up to. To embrace such an approach, legislation must set out what is, and is not, an invasion of personal privacy, under whatever test is established. Further, both Ontario's and British Columbia's law require that individuals be notified when a public body intends to release a record that an official has reason to believe contains exemptible personal information. While the process is fair, it is onerous and bureaucratic. It is also bound to result in delays. On the whole, such a régime is unlikely to be an improvement over the current federal practice and may, in fact, weaken existing protection of personal privacy.

The need for an exemption to protect information obtained in confidence from other governments is understandable. Through the Act's section 13, mandatory protection is given to information provided to the federal government by foreign, provincial or municipal governments. Each government should be responsible for controlling and releasing its own information. **The courtesy needs to be extended to the subdivisions of foreign states (e.g., an American state).** The provision was extended to cover "an aboriginal government" by way of a consequential amendment to the *Nisga'a Final Agreement Act* which was proclaimed on May 11, 2000.

Freedom of information legislation in Ontario, British Columbia and Alberta already has discretionary exemptions for records relating to "intergovernmental relations", exemptions which verge on injury tests (i.e., "could reasonably be expected to reveal a confidence"). **An amendment to section 13 should be rewritten as a discretionary, injury-based exemption. A time limit of perhaps 15 years should apply to all such confidences unless the information relates to law enforcement or security and intelligence matters, or is subject to extensive and active international agreements and arrangements. A public interest override should apply to this exemption.**

Public interest override

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

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

The absence in the federal Act of a general public interest override is a serious omission which should be corrected. Again, with the exception of the personal privacy exemption, the Act should require government to disclose, with or without a request, any information in which the public interest in disclosure outweighs any of the interests protected by the exemptions.

Here again, the section 19 (personal privacy) exemption already has, by reference to the *Privacy Act*, a specifically designed public interest override. Sub-paragraph 8(2)(m)(i) of the *Privacy Act* authorizes the government to disclose personal information without consent when the public interest in disclosure "clearly outweighs" any invasion of privacy that would result. It is entirely appropriate that this high level of protection for personal privacy be maintained.

Section 14: Federal-provincial affairs

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

Section 15: International affairs and national defence

There have been ongoing complaints from requesters about ways in which this complicated exemption is invoked. The Standing Committee put it best in *Open and Shut*:

> "After a broadly worded injury test, nine classes of information which may be withheld are listed. Arguably, 'any information' found in the broad classes listed, whether or not it would be injurious if released, must be withheld. The Information Commissioner has interpreted this section as

requiring the department or agency to establish that the records withheld are not only of the kind or similar in kind to those enumerated in the subsequent paragraphs, but also that the department must provide some evidence as to the kind of injury that could reasonably be expected if the record in question were released. On the other hand, the Department of Justice has asserted that one of the specific heads listed in the paragraphs need not be applied to information before the exemption can be claimed, as long as the specific injury test is met."

The Committee worried that, as currently interpreted, the section did not adequately link injury to the nine classes or illustrations. The Committee's concern remains valid and its recommendation deserves fresh endorsement. **Section 15 of the Act should be amended to clarify that the classes of information listed are merely illustrations of possible injuries. The overriding issue should remain whether there is a reasonable expectation of injury to an identified interest of the state.**

Section 16: Law enforcement

The recommendation has already been made in this report that an injury test be included in all elements of section 16. In effect, this would mean a repeal of paragraphs 16(1)(a) and (b), since all such information would be covered by 16(1)(c) if an injury test were to be introduced.

There can be no justification for secrecy unless a reasonable expectation of injury to an important interest can be demonstrated. This axiom applies to enforcement and intelligence as to any other area.

A decade of experience with the law has shown no compelling reason why such interests should get a 20-year grace period during which secrecy may be maintained without any need to demonstrate an injury from disclosure. This view will be controversial within the law enforcement community, as was the original provision. Though professional nervousness may be understandable, the fears are as groundless now as they were then. The recommended changes will bring the federal Act into line with the law enforcement provisions in Ontario, British Columbia and Alberta.

Section 17: Safety of individuals

In 10 years, the government has rarely used the threat to the safety of individuals as a reason for refusing access. It exists largely for cases dealing with offenders' records. **Nevertheless, it would be useful to address a potential area of controversy by making explicit that this exemption also applies if disclosure could reasonably be expected to pose a threat to an individual's mental or physical health.** The British Columbia law goes this extra step and so should the federal law.

Section 18: Economic interests of Canada

Section 18 deals with a potpourri of issues. It is for the government, however, the rough equivalent of section 20: protection of economic and technical information. **The provision should be amended in parallel with section 20**

regarding the release of the results of product and environmental testing. This was the recommendation of the Standing Committee. As well, the term "substantial value" in paragraph 18(a), relating to trade secrets and financial, commercial, scientific and technical information should be modified and narrowed by the term "monetary".

The issue of protecting "confidential business" information for the government's Special Operating Agencies (SOAs) has also arisen. Several of these entities are being asked to compete with the private sector without the protection other companies enjoy under section 20-third-party information.

Section 19: Personal information

As discussed earlier, this report recommends no major changes to section 19. Any temptation to add an "unwarranted invasion of privacy" test should be resisted. Such a test would create a large, bureaucratic notification process with no perceptible improvement in the current balance between the rights of access and privacy. Indeed, such a change may be seen as attempting to undermine privacy protection at a time when public concern in this area is rising.

Section 20: Confidential business information

Section 20 of the Act protects certain kinds of information furnished to a government institution by a third party. A third party may be an individual, a group or an organization. In practice, it is most often a corporation. Generally, section 20 protects trade secrets, confidential financial and technical information; information which, if released, would likely have an adverse impact on a business or interfere with contractual negotiations. Section 20 is one of the most used, abused and litigated exemptions under the *Access to Information Act*. Many of the Act's delay problems concern requests for business information.

Along with section 19 (the personal privacy exemption), the third-party protection is used more often than any other exemption to refuse disclosure of records. It also shares with section 19 the distinction of being the primary reason why some information available before the law's passage is no longer available. In the case of section 20, however, (and unlike section 19), greater secrecy has no justification.

This Commissioner has seen thousands of government-held records relating to private businesses. Real secrets are rare. Sounding the alarm of competitive disadvantage has become as reflexive in some quarters as blinking. Concern for the public interest in the transparency of government's dealings with private businesses has been almost abandoned by government officials.

New rules of the road are needed to govern the right to know more about government dealings with the private sector. First, the law should tell firms choosing to bid for government contracts that the bid details, and details of the final contract, are public for the asking. Access to such records is essential if this facet of government is to be transparent and if the public is to have confidence that taxpayer dollars are being well-spent. As matters now stand, only partial glimpses are possible. There is partial disclosure of winning bids,

none at all of losing bids. Contract prices are released without details. That is not good enough. Section 20 should be amended to put more accountability in the government contracting process.

Government holds a vast array of information about private businesses, information unrelated to government contracts. Ours is a highly regulated society. In many fields--agriculture, health, communications, environment, fisheries, native affairs, regional development--information from private sector firms figures prominently in government files. With government downsizing and privatization, more and more matters affecting the public interest are dealt with by the private sector. Government officials and private firms should not be able to agree among themselves to keep information secret. Yet, paragraph 20(1)(b) comes perilously close to giving authority for just such a cozy arrangement. It requires government to keep secret:

> "financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party".

The provision, paragraph 20(1)(b), should be abolished. Paragraph 20(1)(c), as it now stands, is fully adequate to ensure that any legitimate business need for secrecy is served. It requires government to keep secret:

> "information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party".

It is questionable whether paragraph 20(1)(a) (regarding trade secrets) is needed in the light of paragraph 20(1)(c). Any information which would qualify for secrecy as a trade secret would certainly qualify for secrecy under 20(1)(c).

A particularly unsatisfactory aspect of section 20 is the public interest override contained in subsection 20(6). While it is essential that there be a public interest override--we must know about unsafe airplanes, unhealthy medications and dangerous products, whatever the consequences to their makers--it does not make sense to limit the override to matters of "public health, public safety or the protection of the environment"; the public interest in matters such as consumer protection is equally deserving of coverage.

The earlier recommendation that all exemptions be subject to a general public interest override would remedy this problem. **Even if a general override is not accepted by Parliament, the override now contained in subsection 20(6) should be broadened.**

Not only is the present Act overly cautious in extending secrecy protection to private businesses, it puts in place an unwieldy procedural apparatus which contributes to delay and administrative burden.

Delays are the result of the mandatory requirement that government institutions give direct notice to and consult with third parties before records may be released. Similar requirements are imposed on the Information

Commissioner if he proposes to recommend disclosure. Often there are many third parties (in one previous case there were 126,000 of them) and the direct notice and consultation requirement is simply impractical. Faced with those situations, departments are tempted to take the path of least resistance. They simply refuse to disclose the information and pass the dissatisfied requester over to the Information Commissioner, along with all the notice and consultation headaches.

The Standing Committee made several recommendations to improve the situation. **One would allow other forms of notice--public notice or advertisement--whenever substituted notice is likely to be effective, practical and less costly than direct notice. That recommendation is eminently sensible and should be part of the federal legislation.**

Section 21: Advice and recommendations

The advice and recommendations exemption, together with the exclusion of Cabinet confidences, ranks as the most controversial clause in the *Access to Information Act*. From early debate to this day, critics have attacked its broad language which can be made to cover--and remove from access--wide swaths of government information. The Standing Committee voiced its opinion that the exemption "has the greatest potential for routine misuse". The government seemed to agree, taking pains in its policy guidance to admonish caution and to build in the injury test omitted from the legislation.

The question then: How best to reform section 21? The Standing Committee recommended that it contain an injury test that would acknowledge the need for candour in the decision-making process--a measure consistent with the Treasury Board's Secretariat's policy. The committee went on to advocate another clarification. The exemption would only apply to policy advice and minutes at the political level of decision-making, not factual information used in the routine decision-making process. Finally, the committee recommended reducing time limitation in the current exemption from 20 to 10 years. It seems an appropriate period of time to protect material used in a decision-making process. **The Committee's recommendations here are more than a good start. Yet reform needs to go further. An amended section should emulate the laws of Ontario and British Columbia. Each has a long list of types of information not covered by the exemption--factual material, public opinion polls, statistical surveys, economic forecasts, environmental impact statements and reports of internal task forces.**

There should also be an attempt to define the term "advice" in the sensible, balanced way currently set out in the Treasury Board policy manual.

The exemption should be clearly limited to communications to and from public servants, ministerial staff and ministers. As well, the provision should be made subject to a public interest override. In sum, these changes will better define what information can be protected to preserve government's need to conduct some deliberations in private.

Finally, paragraph 21(1)(d) should be amended. As it now stands, this exemption allows public servants to refuse to disclose plans devised but never approved. As the British Columbia legislation now allows, rejected plans should be as open to public scrutiny as plans which are brought into effect.

Section 23: Solicitor-client privilege

It has become obvious during the last 10 years that the application and interpretation of section 23 by the government (read: Justice Department) is unsatisfactory. Most legal opinions, however stale, general or uncontroversial, are jealously kept secret. **In the spirit of openness, the government's vast storehouse of legal opinions on every conceivable subject should be made available to interested members of the public.**

Tax dollars are paid for these opinions and, unless an injury to the conduct of government affairs could reasonably be said to result from disclosure, legal opinions should be disclosed. These opinions are to lawyers what advance tax rulings are to accountants and should be equally accessible.

One final matter on section 23. The Act is unequivocal that section 23 is subject to section 25: any information in a record which does not qualify for solicitor-client privilege must be released. Section 25 is the so-called "severance" requirement. The courts, too, have decided that section 23 is subject to the severance requirement. Nevertheless, the Justice Department continues to advise institutions not to apply severance to a record containing solicitor-client material. Justice clings to the view that, if any portion of a record is disclosed from a record containing privileged material, the privileged portions may somehow be stripped of their privilege.

For this reason, section 23 should be amended to spell out that the application of severance to a record under the authority of section 25 does not result in loss of privilege on other portions of the record.

These clarifications along with the earlier recommendation that this exemption be made subject to an injury test and a public interest override will bring one of the most carefully guarded bastions of reflexive secrecy into line with the principles of open government.

Section 26: Information to be published

The thinking behind the need for this exemption is sound. If the government plans to publish a record within a reasonable period of time, it may refuse access in the meantime without thwarting the principle of openness. That being said, the provision, in practice, has been used to delay access unduly. The abuse should be addressed.

First, the period of grace now stipulated in the section--90 days--is unnecessarily long. Sixty days is ample time given modern printing methods; the Act should be amended to reduce the grace period.

Second, the provision has been relied upon as a device to buy extra time. An institution may receive a request for a record, deny the request on the basis of

section 26 and, when that period expires, change its mind about publication and simply apply exemptions to the record. **Section 26 should be amended to prevent such abuse by stipulating that if the record is not published within the 90 days (or 60 days as recommended) it must be released forthwith in its entirety with no portions being exempted.**

Third, the provision did not contemplate publication by posting on a website. **It is appropriate that the provision be expanded to cover any form of publication, including electronic.**

Witness Protection

Subsection 36(3) of the Act encourages witnesses to be cooperative and candid with the Commissioner by providing that the evidence they give may not be used against them except in limited circumstances, including in respect of a prosecution of an offence under the Act. As a result of the addition of section 67.1 to the Act in 1999, a new offence was created (improper records alteration or destruction).

Subsection 36(3) does not prevent the use of witness evidence against a witness in a prosecution for an offence under section 67.1. This poses fairness problems as well as practical problems for the Commissioner in securing witness cooperation and candour. The Commissioner is not in the business of conducting criminal investigations and witnesses should not fear any self-incrimination with respect to any offence, save perjury and obstruction, when they give their evidence.

Consequently, it is recommended that subsection 36(3) be amended to specify that evidence given to the Commissioner by a witness is inadmissible against the witness in a prosecution of an offence under section 67.1.

Section 68

Section 68 excludes from the Act "published material or material available for purchase by the public." Situations have arisen where information is available for purchase at prohibitively high price or published in a format which is inaccessible to some individuals. Yet, despite the effective barriers to access posed by the price and format, it was not possible for the information seekers to assert a right of access under the Act.

These circumstances are rare, but may arise more frequently when government begins making exclusive use of Internet websites to "publish" information, while many citizens many not have access to the net.

The Act should solve this weakness in section 68 by providing that any records which are available for purchase at a "reasonable price" and which are published in "reasonable formats" are excluded from the Act. In cases of dispute over the meaning of those terms, a complaint would be available to the Information Commissioner.

Appendix B

A: Requester Profile

❑ Individual

❑ Media

❑ MP / Senator

❑ Researcher

❑ Org (Public Int.)

❑ Commercial

❑ Other (specify)

B: Content Profile

Request categorized by content categories relating to departmental business lines and request patterns.

- Policy
- Adm / Pers / Fin
- Contracts
- Grants / Contributions
- Regulatory filings
- Operational

C: Processing Times Profile (30 days)

i) Processing Stages and Standards:

❑ Intake

❑ Tasking / Review – Search – OPI

❑ Communication

❑ Review – Decision – ATIP

❑ Approval -OPI
-DM
-MO

❑ Final processing

ii) Total # of requests

❑ Days elapsed at each stage

❑ Actual # of search and preparation hours

❑ Total days elapsed

❑ # in deemed refusal

❑ Duration of deemed refusal

❑ # extended and duration of extension

D: Extensions Profile

9(1)(a)
• Volume (pages)
• OPI's

9(1)(b)
• Other institution
• Other gov't -Foreign
-Domestic
• Individual
• Section 69
• Other – specifics

9(1)(c)
• 20 days (Reps – Third Party)
• 30 days (from date of receipt of Notice)

E: Disclosure/Application of Exemptions

Mandatory: ***Discretionary:***

13(1)(a), etc. Number 21(1)(a), etc. Number

% of requested info disclosed

❑ 100

❑ 75

❑ 50

❑ 25

❑ 0

• Pages disclosed in total
• Pages partial
• Pages withheld in total

F: Costs and Fee Profile

i) Policy

- collection
- waiver
- refund

❑ A -Number of requests seeking fee waiver

❑ B -Source

❑ C -Amount of fees waived (re: A)

❑ Amount of fees assessed
-Photocopy
-Preparation / Search
-Programming

❑ Deposit sought

❑ Deposit paid

❑ Fees refunded

ii) Total fees collected
-photocopy
-secret and preparation
-programming

❑ Total fees waived

❑ Total salary costs (ATIP)

❑ Total O&M costs (ATIP)

❑ Total operational costs (based on search hours)

❑ Other auditable criteria

G: Communication with Requestor Profile

❑ Clarification (Section 6) and requester response
(elapsed days from receipt)

❑ Fee estimate and requester response
(elapsed days from receipt)

❑ Other (elapsed days from receipt)
Purpose

H: Form of Response Profile

- ❑ Response by copies
- ❑ Response by viewing
- ❑ Requestor abandon

I: Transfer Profile

Number	Within 15 days
Number	Refused (Institution)