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THE *ACCESS TO INFORMATION ACT* AND RECENT PROPOSALS FOR REFORM

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INTRODUCTION

It is widely agreed that, after more than 20 years in operation, the *Access to Information Act* (ATIA) should be updated. The Conservative, New Democratic and Bloc Québécois parties all included access to information reform in their platforms for the 2006 election. The legislation is recognized as a critical element of the transparency and openness in government that is necessary to the proper functioning of Canada's parliamentary democracy. Justice John Gomery, in the Phase 2 report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability*, acknowledged the importance of the legislation, saying that "an appropriate access to information regime is a key part of the transparency that is an essential element of modern public administration."(1)

The Act has been reviewed many times since its inception, giving rise to a significant accumulation of reform proposals. This paper identifies the key points emerging from the major studies of the Act that have been conducted over the last two decades, and analyzes in some detail the most recent proposals concerning the legislation. Finally, it reviews the elements of the Conservative, New Democratic Party (NDP) and Bloc Québécois election platforms related to access legislation reform, comparing them and identifying which items find support in the earlier proposals.

THE *ACCESS TO INFORMATION ACT*

The *Access to Information Act*, in force since 1983, gives Canadians a broad legal right to information that is recorded in any form and controlled by federal government institutions. Individuals may apply for access to certain information, and, unless the requested information falls within specific and limited exceptions, the Act requires its release within

(1) Commission of Inquiry into the Sponsorship Program & Advertising Activities, *Restoring Accountability: Recommendations*, 2006, p. 179, http://www.gomery.ca/en/phase2report/recommendations/ cispaa_report_full.pdf.

specified time limits. The exemptions are set out in the Act; they generally relate to individual privacy, commercial confidentiality, national security or other confidences necessary for policy-making. Records containing Cabinet confidences are excluded from the operation of the Act for 20 years from the date of their making.

If a request for access to information is refused, the applicant may complain to the Office of the Information Commissioner.(2) Applicants may also complain if they believe that they have been asked to pay too much for copied information, or the information released was not in the language of the applicant's choice, or the time for release or translation of the document was unreasonable. The Commissioner's staff investigates complaints. As an ombudsman, the Commissioner relies on persuasion to resolve disputes. Following the investigation and a report from the Commissioner, complainants have a right to apply to the Federal Court for a review of a record-holding institution's decision to refuse access. The Commissioner does not have the power to order a department to release information, but can support a complainant in an application to the Federal Court of Canada to order disclosure of records.

TWO DECADES OF REVIEW OF THE ACT

Beginning with the statutorily mandated review of the ATIA begun in 1986, the Act has undergone a number of important examinations. Reports of those reviews, as well as several other reform proposals, are listed below in chronological order by date, and briefly summarized.

A. *Open and Shut*

In 1986, three years after the Act came into force, the House of Commons Standing Committee on Justice and Solicitor General ("the Justice Committee") conducted a comprehensive review of the provisions and operation of the *Access to Information Act* and the *Privacy Act*. In 1987, that Committee tabled a unanimous report to Parliament, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*,(3) which contained over

(2) The Web site of the Office of the Information Commissioner provides answers to frequently asked questions about using the *Access to Information Act*, including the complaint procedures; see http://www.infocom.gc.ca.

(3) Report of the Standing Committee on Justice and Solicitor General on the Review of the *Access to Information Act* and the *Privacy Act*, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, Queen's Printer of Canada, Ottawa, 1987.

100 recommendations for amending both Acts. Many of these recommendations, still unfulfilled, have been repeated more recently in the reports of other reviews of the ATIA.

Some of the Justice Committee's proposals, still relevant 20 years later, included: the creation of a public education role for the Commissioner; the expansion of the Act's application to all government institutions, unless specifically excluded; and improved training for, and legislative recognition of the role of, government access and privacy coordinators. The Justice Committee dealt extensively with exemptions, recommending the addition of a discretionary injury test in most cases.

With regard to Cabinet records, which are excluded from the operation of the Act, the Committee proposed that this exclusion be deleted and replaced with an exemption that would not be subject to an injury test. The exemption would cover all Cabinet records that would reveal the substance of ministers' deliberations, for a reduced period of 15 years. Such a change, if approved, would have been significant, because the current exclusion of Cabinet confidences (under section 69 of the Act) means that, when such records are withheld from the public, 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. Making these documents exempt rather than excluded would allow the Commissioner or the Court to investigate the government's determinations that such documents should not be released.

The Justice Committee also recommended that the Act should cover all publicly funded government institutions, as well as those that raise funds through public borrowing, depending on the degree of government control exercised. It proposed the inclusion of: all Crown corporations and wholly-owned subsidiaries that are listed in the Treasury Board's *Annual Report to Parliament on Crown Corporations and Other Corporate Interests of Canada*; any body of which the members are appointed by the federal government; both Houses of Parliament (excluding the offices of Members of Parliament and Senators); the Library of Parliament; and other offices directly accountable to Parliament.(4)

(4) Those offices are the five Officers of Parliament: the Auditor General, Official Languages Commissioner, Chief Electoral Officer, Information Commissioner, and Privacy Commissioner.

Finally, the Justice Committee's report included recommendations to eliminate application fees and to allow the Commissioner to empower a government institution to disregard frivolous or vexatious requests.

In an earlier report of the Justice Committee, which was included as Appendix B[5] to the main report, the Committee recommended that the Act be amended by repealing two elements: section 24, which currently provides for a mandatory exemption for information the disclosure of which is restricted by a statutory provision listed in Schedule II of the Act; and Schedule II itself. The deleted provisions would be replaced with mandatory exemptions for three statutory provisions requiring specific protection because they deal with income tax records and information provided by individuals, corporations and labour unions for statistical purposes.[6]

The Government Response to the report, entitled *Access and Privacy: The Steps Ahead*,[7] generally supported the administrative, but not legislative, changes proposed in the report.

B. *A Call for Openness*

In the summer of 2001, a number of Members of Parliament from various parties formed an *ad hoc* MPs' Committee on Access to Information ("the *ad hoc* Committee") for the purpose of reviewing the federal access regime. The *ad hoc* Committee, chaired by Liberal MP John Bryden, produced a report in November 2001, *A Call for Openness*,[8] containing 11 recommendations for improving the provisions and operation of the Act.[9] In undertaking this study, the *ad hoc* Committee was at least partly motivated by a concern that the Access to Information Review Task Force (discussed below) had not provided for consultation with the public or with parliamentarians.

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(5) *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, Appendix B: *Committee's Report on S. 24* (19 June 1986), p. 113.

(6) The three statutes were the *Income Tax Act*, the *Statistics Act*, and the *Corporations and Labour Unions Returns Act* (later renamed the *Corporations Returns Act* and then repealed in 1998).

(7) *Access and Privacy: The Steps Ahead*, Government of Canada, 1988.

(8) MPs' Committee on Access to Information, *A Call for Openness*, Ottawa, November 2001.

(9) In a letter attached to the report, two Bloc Québécois MPs (Paul Crête and Claude Bachand) made several additional proposals.

Citing a growing diversification of the mechanisms and organizations by which public purposes are pursued, such as privatization, contracting out and the creation of special operating agencies, the *ad hoc* Committee advocated a principled approach to determining which government institutions should be subject to the Act. It recommended that the Act's scope should cover any institution that is: established by Parliament; publicly funded; publicly controlled; or that performs a public function. The Committee recommended that the Act should be amended to enshrine those principles, and that all institutions that fit within them should be listed in Schedule I of the Act, including Crown corporations, Parliament (except for parliamentarians' offices), and offices reporting to Parliament.(10)

The *ad hoc* Committee, while recognizing the sensitivity of Cabinet records, recommended that the section 69 exclusion of Cabinet records be replaced by an injury-based discretionary exemption to protect the confidentiality of Cabinet deliberations for 15 years after the creation of the records. This would allow for independent review of decisions about such records by the Information Commissioner and the Federal Court of Canada.

The exemption in section 14 for records relating to the conduct of federal-provincial affairs was determined by the *ad hoc* Committee to be overly broad, and it recommended that the exemption be narrowed so that it was available only in relation to federal-provincial consultations and deliberations. The Committee also recommended narrowing the exemption for solicitor-client privilege, proposing that it be made an injury-tested rather than a class exemption,(11) and that it be available only where the person creating the record had done so as counsel to an institution in the context of actual or contemplated litigation.

The *ad hoc* Committee recommended the inclusion in the Act of a general "passage of time" provision, providing for the routine release of all documents within an institution's control 30 years after their creation.

An amendment to require a comprehensive parliamentary review of the ATIA every five years, as well as ongoing compliance reviews by the departments responsible for the Act, was also called for in the report. A final matter dealt with the then-proposed *Anti-Terrorism Act*, Bill C-36.(12) This legislation, passed in December 2001 but still under consideration at the

(10) The a*d hoc* Committee recommended that the Act not apply to the judiciary.

(11) A class exemption excludes all documents in a certain class (i.e., fitting a specific definition under the Act) from the operation of the Act.

(12) Bill C-36, an Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities in order to combat terrorism, received Royal Assent on 18 December 2001 and came into force in three stages between 24 December 2001 and 6 January 2003.

time of the *ad hoc* Committee's report, added section 69.1 to the Act, to exclude from the operation of the Act any documents that are prohibited from disclosure by certificates issued under the *Canada Evidence Act*. The Committee indicated that it would have preferred that the relevant clause be withdrawn, but recommended that, if it passed, it should be subject to a three-year sunset clause.

C. *Access to Information: Making It Work for Canadians* (the Access to Information Review Task Force Report)

In August 2000, the President of the Treasury Board and the Minister of Justice established the Access to Information Review Task Force to review all components of the Access to Information framework, including the Act, regulations, policies and procedures. The Task Force, consisting of government officials and chaired by Andrée Delagrave,(13) created advisory committees, published a consultation paper, commissioned and published research papers, and held consultations. In June 2002, it released a lengthy report, *Access to Information: Making it Work for Canadians*,(14) containing 139 recommendations for change.

The report indicates that the members of the Task Force were concerned with the implications of new information technology for the way government information is created, communicated and stored. While the Act was found to be basically sound, the Task Force recognized a need to modernize some aspects of it, and examined in detail a number of procedural and administrative aspects of the government's implementation of the Act.

Recommendations for modernizing the Act included: expanding its scope by extending coverage to a wider range of federal institutions, including most Officers of Parliament,(15) and to Parliament, with certain protections; modernizing the exemption and exclusion provisions, such as by including Cabinet confidences in the operation of the Act, and by a number of other adjustments to the exemption provisions; improving training and resources

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(13) All but one of the Task Force members came from federal government departments. The exception was a representative of the Government of Newfoundland and Labrador.

(14) Access to Information Review Task Force, *Access to Information: Making It Work for Canadians*, Queen's Printer of Canada, Ottawa, 2002, available on-line at http://www.atirtf-geai.gc.ca/report/ report1-e.html#table.

(15) Specifically, the Offices of the Auditor General, the Official Languages Commissioner, the Privacy Commissioner of Canada, and the Information Commissioner of Canada. The term "Officers of Parliament" has been used in different contexts to mean different things, but for the purposes of this paper it includes the four positions mentioned above plus the Chief Electoral Officer.

available to access to information staff; and improving information management and facilitating a culture of access across government. The report also recommended that consideration be given to replacing the current ombudsman model of the Office of the Information Commissioner with one having full order-making powers.

The Task Force took a more cautious approach to expanding the Act's institutional coverage than had previous committees reviewing the ATIA. The Task Force recommended that the Act should not extend to every private-sector entity that might be viewed as having an impact on the public interest. It recommended that the Act be amended to set out criteria for determining which entities should be covered, including those for which the government appoints a majority of board members, provides all funding or owns a controlling interest; or those functioning in an area of federal jurisdiction with respect to health and safety, the environment or economic security; except where inclusion would be "incompatible with the organization's structure or mandate."(16) The Task Force proposed covering Parliament, but excluding information protected by parliamentary privilege and the personal, political and constituency records of parliamentarians.

The recommendations concerning the treatment of Cabinet confidences included a proposal for a narrower definition focusing on information that would reveal the substance of matters before Cabinet and deliberations between or among ministers. However, the Task Force would have made the class exemption for Cabinet documents mandatory, meaning that such records could not be disclosed. Under the Act, there is currently room for discretionary disclosure of these records, which the Commissioner argued, in his response to the Task Force (discussed below)(17) would be lost if this recommendation were implemented. Cabinet confidences are excluded from the operation of the Act, but if ministers and the Clerk of the Privy Council choose not to assert Cabinet confidence, then such documents may be released.

Endorsing some of the 1986 proposals of the Justice Committee, the Task Force recommended that the period for which Cabinet confidences are protected should be reduced from 20 to 15 years, and that decisions to refuse to disclose records on the basis of Cabinet confidence should be reviewable by the Federal Court, rather than the Information Commissioner.

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(16) Task Force report, Recommendation 2.1.

(17) Information Commissioner of Canada, *Response to the Report of the Access to Information Review Task Force: A Special Report to Parliament*, Minister of Public Works and Government Services Canada, Ottawa, 2002, p. 19.

Rather than recommending the repeal of section 24, which exempts from disclosure records restricted by a statutory provision listed in Schedule II of the Act, as the Justice Committee had, the Task Force recommended its retention, but proposed that the list of statutes in Schedule II be substantially reduced by assessing them against new criteria that should be developed and included in the Act.

D. Private Members' Bills (C-462, C-201)[18]

In the fall of 2003, the Chair of the *ad hoc* MPs' Committee, John Bryden, attempted to initiate a comprehensive overhaul of the Act through a private Member's bill, Bill C-462,[19] which died on the *Order Paper* with the dissolution of the 37th Parliament in May 2004. A similar bill was introduced by NDP MP Pat Martin on 7 October 2004 as Bill C-201.[20] Because the bills' provisions are virtually identical, they will be referred to as one bill in this paper.

The bill would have changed the name of the ATIA to the "Open Government Act." It would have expanded the scope of the Act by adding new institutions to Schedule I,[21] which lists the institutions to which the Act applies. The bill would have broadened the purpose section of the Act, adding a reference to the federal government's obligation to release

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(18) Earlier private Members' bills proposing amendments to the ATIA are not discussed in this paper. For example, Bill C-208 (passed in 1998) amended the *Access to Information Act* to make it an offence for anyone to destroy, mutilate, alter, falsify or conceal a record with intent to deny a right of access: http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/private/C-208/C-208_3/C-208_cover-E.html. Bill C-206, an earlier comprehensive reform package proposed by MP John Bryden, was defeated: http://www.parl.gc.ca/36/2/parlbus/chambus/house/bills/private/C-206/C-206_1/C-206_cover-E.html.

(19) Bill C-462, An Act to amend the Access to Information Act and to make amendments to other Acts, first reading, 28 October 2003, http://www.parl.gc.ca/37/3/parlbus/chambus/house/bills/private/C-462/C-462_1/C-462_cover-E.html.

(20) Bill C-201, An Act to amend the Access to Information Act and to make amendments to other Acts, first reading, 7 October 2004, http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/private/C-201/C-201_1/C-201_cover-E.html. Bills C-462 and C-201 were identical except that clauses 36 and 37 of the first bill were not included in the second, as they dealt with coordinating amendments related to two bills that were before Parliament in 2003, and were subsequently passed.

(21) The bill would have amended Schedule I to add, in addition to the organizations already listed, any department or ministry of state of the federal government, as well as a Crown corporation or a wholly-owned subsidiary of a Crown corporation as defined in the *Financial Administration Act*, and any incorporated not-for-profit organization that receives at least two-thirds of its financing through federal government appropriations.

information to assist Canadians in assessing government effectiveness and compliance with the *Canadian Charter of Rights and Freedoms*.

The bill also proposed a number of changes to the exemptions provided under the Act, and would have deleted section 24 of the Act. It would have extended the Commissioner's reporting requirements to require that his (or her) Annual Report list the names of every government institution that failed to meet the requirements of the Act. A new section would have created the offence of wilfully obstructing a person's right of access under the Act to a record under the control of a government institution.

Another new section would have brought Cabinet confidences under the Act, as a mandatory exemption covering information that is less than 15 years old and that would reveal the substance of deliberations between ministers in making government decisions or setting policy.

E. The Information Commissioner's *Response to the Report of the Access to Information Review Task Force*

In October 2002, the Information Commissioner of Canada, the Honourable John Reid, tabled a special report(22) in Parliament responding to the Task Force report, and outlining in Appendix A, "Blueprint for Reform," his proposals for legislative change. The Commissioner was critical of both the process and the results of the Task Force's review. In his view, the Task Force, being composed of government officials who consulted heavily within government, was too strongly influenced by "insiders"; the Commissioner felt that, as a result, the recommendations made in its report would weaken the access to information regime.

Some of the Task Force recommendations that were of most concern to the Commissioner were those related to the Act's exemption and exclusion provisions. While four of the recommendations would increase openness, most importantly the inclusion of Cabinet confidences, the Commissioner argued that 15 of the proposals would have increased secrecy. He was especially concerned about the Task Force's proposal(23) to exclude from the right of

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(22) Information Commissioner of Canada, *Response to the Report of the Access to Information Review Task Force: A Special Report to Parliament*, Minister of Public Works and Government Services Canada, Ottawa, 2002, available on-line at http://www.infocom.gc.ca/specialreports/pdf/2002special-e.pdf.

(23) Task Force report, Recommendation 3-5.

access notes made by public servants in the course of their duties, if the notes were "not shared with others or placed on an office file."

Commissioner Reid, in his Response, advocated the use of exemptions rather than exclusions where secrecy is justifiable, adding that the exemptions should be made discretionary and subject to an injury test as well as a public interest override. He recommended that all public institutions, as well as all private institutions exercising public functions, be brought within the scope of the Act. He objected to the Task Force's recommendation to exclude his Office from investigating complaints about cases concerning Cabinet confidences, and disagreed with several other proposals that he said would increase Cabinet secrecy.

Proposed increases to fees and the creation of additional hurdles to be overcome by access requesters were also criticized by Commissioner Reid as pro-secrecy recommendations. The Response further recommended the creation of a legislative duty requiring public servants to document their business activities and ensure that those records are properly included in an institutional system of records. The Commissioner did support the Task Force proposals for promoting a culture of openness in the public service, and he recommended that the Minister not proceed to draft legislation based on the report, but that public consultations precede such a step.

In his "Blueprint for Reform," Commissioner Reid set out his recommendations for access to information reform. He proposed that: the Cabinet confidence exclusion be transformed into a more limited exemption, subject to independent review; the scope of the Act be expanded by setting legislative criteria for institutions that should be covered; section 24 be abolished; and incentives and penalties related to deadlines under the Act be established. The Blueprint recognized that its proposed criteria for the inclusion of more institutions under the Act[(24)] would bring under its purview both Houses of Parliament, and 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 the offices of members of the House of Commons and the Senate.

Commissioner Reid also recommended that the Act be subject to a general public interest override, such that the Act would require government to disclose, with or without a

(24) The recommendation would also bring under the Act the Chief Electoral Officer along with the four Officers of Parliament listed in footnote 15.

request, "any information in which the public interest in disclosure outweighs any of the interests protected by the exemptions."[25]

F. The Justice Minister's *Comprehensive Framework for Access to Information Reform*[26]

In April 2005, the Justice Minister (at that time, Irwin Cotler) introduced a discussion paper entitled *A Comprehensive Framework for Access to Information Reform* ("the Framework"), asking the House of Commons Standing Committee on Access to Information, Privacy and Ethics ("the Committee") for input on a range of policy questions before the introduction of legislation. Many areas were left open for the consideration of the Committee, but in some areas government positions were indicated.

When he presented the Framework to the Committee in April 2005, the Minister indicated that while he agreed that reform of the ATIA was required, he believed it important that a parliamentary committee first study the major issues before draft legislation was developed.[27] Both in that meeting and in the Framework, Minister Cotler stressed the importance of freedom of information legislation, as it provides the "cornerstone of a culture of democratic governance, involving accessibility, transparency, and accountability in government."[28] The Framework mentioned the changing technological context in which government operates, as well as the increasing number of government functions outsourced to consultants, contractors or alternative service delivery organizations, as supporting the need for modernization of the Act.

While agreeing that the Act's scope should be expanded, the Framework made proposals to change some aspects of the scope of the Act, and asked the Committee to consult the public and make recommendations in relation to others. In terms of Crown corporations, the Framework identified ten parent Crown corporations that could be included without legislative

(25) Information Commissioner of Canada (2002), p. 64.

(26) Available on-line at http://www.justice.gc.ca/en/dept/pub/ati/ati_whitepaper.pdf.

(27) House of Commons Standing Committee on Access to Information, Privacy and Ethics, *Edited Evidence*, 5 April 2005, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId= 138583.

(28) *Ibid*.

reform,[29] and indicated that the process for extending the Act to those entities was already under way.[30] For seven other Crown corporations, the paper expressed the view that exemptions in the current Act were not sufficient to protect their commercial or other interests.[31] The paper suggested that six of those seven could be included with the addition of the proper protections, but that the Canadian Broadcasting Corporation might more appropriately be excluded to protect its journalistic integrity. For the Canada Pension Plan Investment Board, the 18th Crown corporation under consideration for inclusion in the ATIA, inclusion was not recommended, and consultation with the provinces was proposed because of the federal/provincial nature of the organization.

In terms of extending the Act's coverage to institutions outside the Government of Canada itself, the government agreed with earlier proposals for criteria to be developed to determine which bodies should be covered, and emphasized that the criteria should be related to stable characteristics such as function or controlling interest by the government, and not to fluctuating characteristics such as funding. The paper noted the earlier recommendations that Officers and agents of Parliament, as well as Parliament itself, be covered, and suggested that the Committee consult those that would be affected in order to determine what special protections might be needed.

In terms of who should have the right to apply for records under the Act, the Framework asked the Committee to consider whether the right to apply should be extended to any person. Currently, the Act provides that right to Canadian citizens and permanent residents, and to anyone else present in Canada; that right is not available to non-Canadians who are outside Canada. The Framework suggested that there may be costs associated with universal access that should be considered before such a change is implemented.

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(29) The Canada Development Investment Corporation, Canadian Race Relations Foundation, Cape Breton Development Corporation, Cape Breton Growth Fund Corporation, Enterprise Cape Breton Corporation, Marine Atlantic Inc., Old Port of Montreal Corporation Inc., Parc Downsview Park Inc., Queens Quay West Land Corporation, and Ridley Terminals Inc. Justice Canada, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, April 2005, pp. 5-6.

(30) The ten Crown corporations were added to Schedule I of the Act by Order in Council in August 2005, SOR2005-0251, http://canadagazette.gc.ca/partII/2005/20050921/pdf/g2-13919.pdf.

(31) Atomic Energy of Canada Ltd., Canada Post Corporation, Canadian Broadcasting Corporation, Export Development Canada, National Arts Centre Corporation, Public Sector Pension Investment Board, and Via Rail Canada Inc. (Justice Canada (2005), p. 6).

The Framework proposed the continued exclusion of Cabinet confidences, more narrowly defined,[32] from the application of the ATIA, but it would have empowered the Information Commissioner to ask the Federal Court to review the government's determination that excluded information falls within the definition of a Cabinet confidence. The government also proposed to maintain the 20-year period of protection for such records, rather than reduce it to 15 years.

No proposal was made in the Framework to change the treatment of records in ministers' offices. Such records, which the government continues to treat as excluded from the operation of the Act, include materials such as planners and calendars that are not generated by officials within the department and that pertain more to the activities of the minister and the operations of his or her own office. This interpretation – that such documents should be excluded – has been challenged by the Information Commissioner before the Courts.[33]

The Framework referred to recommendations that the Commissioner and the Task Force had made for changes to the exemptions in the Act, including those dealing with records obtained from other governments, information that could threaten health and safety, government economic interests, third-party information, draft audits, and advice and deliberations; and it asked the Committee to express its views on those earlier proposals. Pointing out that the ambit of the exemption for solicitor-client privilege has been contentious, the Framework recognized a need for clarification of sections 23 and 25 of the Act, the combined effect of which is to protect such information but to require the release of those parts of records that can be severed from the privileged parts.

A similar rationale to that which underlies traditional solicitor-client privilege, fostering free information sharing and negotiation by ensuring a context in which the parties are confident that the information offered will remain confidential, was described as also supporting the emerging concept of mediation privilege. The Framework proposed that this new privilege should be explicitly protected under the ATIA. The government also sought the Committee's suggestions in terms of other new forms of privilege that might justify protection under the Act.

The Framework indicated the government's willingness to consider the proposals made in Bills C-462 and C-201 that new exemptions be added to the Act to protect information

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(32) The proposed definition would focus on information or communications that reveal the substance of Cabinet's deliberations, decisions and submissions (*ibid*., p. 14).

(33) *Ibid*., pp. 15-16.

that, if disclosed, could damage or interfere with the preservation, protection or conservation of cultural and natural heritage sites or increase the risk of extinction of endangered species. It also indicated that a provision excluding notes taken by members of administrative tribunals and boards during quasi-judicial proceedings was being considered by the government. The need for this new statutory exemption has been questioned in a number of the reports discussed above, on the basis that these types of information are already adequately protected by the exemptions for personal information and third-party information.

Both the Information Commissioner's Blueprint and the private Members' bills recommended the elimination of section 24 and Schedule II of the ATIA. In the Framework, the Minister supported the Task Force's proposal that the provisions be retained, but recommended that the number of provisions in Schedule II be reduced and that criteria be established to determine the provisions that should be listed in future. The paper suggested that a high standard for inclusion should be set, with specific criteria and an overall test that the government institution seeking to add a provision must justify why the information cannot be adequately protected by the exemptions already in place in the Act.

A number of process issues were raised for discussion in the Framework, including: whether the basic application fee should be changed; whether the fee structure should distinguish between commercial and non-commercial requesters; how to deal with extremely large requests, or frivolous, vexatious and abusive requests; whether new administrative time limits should be imposed; whether institutions should be required to assist applicants in formulating requests; whether the non-investigative processes of the Office of the Information Commissioner should be enshrined in the legislation; and whether the Act should be amended to codify certain processes to ensure procedural fairness in the redress process.

Like the Task Force report, the Framework mentioned the possibility of changing the Commissioner's Office from that of an ombudsman to a quasi-judicial, order-making body as one option that might benefit from further study. Non-legislative reforms to enhance the public service culture of transparency and improve government compliance with the ATIA were also suggested in the paper, with the request that the Committee determine in which areas the available resources might best be spent.

G. The "Open Government Act"

Rather than embarking on a study of the matters raised in the Framework, the Committee asked Information Commissioner John Reid to develop a bill that would amend the Act. This he did, with the help of the Legislative Counsel of the House of Commons. The Information Commissioner's proposal, in the form of a bill amending the ATIA, would go substantially further than any of the previous reform proposals in promoting openness.(34) Like Bills C-462 and C-201, the Commissioner's proposed bill, which would also be entitled the "Open Government Act," would expand the number of institutions to be covered by the Act, reduce the scope of secrecy permitted by the Act, expand the powers of oversight by the Commissioner and the courts, and increase incentives for compliance and penalties for non-compliance.

The Commissioner's proposed "Open Government Act" was endorsed by Judge Gomery in his Phase 2 report, *Restoring Accountability*. All of the elements of the proposal reviewed in this paper are supported in the Gomery report, which also specifically urged the government to adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.(35)

The Commissioner's proposed bill would extend the Act's scope to cover all federal institutions except the courts and the offices of Members of Parliament and Senators. A new provision would require the federal Cabinet to include the following in the list of bodies covered under the bill, to be set out in Schedule II:(36) all departments; all bodies or offices funded in whole or in part from parliamentary appropriations or wholly- or majority-owned by the federal government; all bodies listed in Schedules I-III of the *Financial Administration Act*; and all bodies performing public functions in areas of federal jurisdiction that are essential to the public interest in relation to health, safety or environmental protection. Officers and agents of Parliament would be included, namely, the Auditor General, the Chief Electoral Officer, and the Information Commissioner, Privacy Commissioner and Official Languages Commissioner of Canada, and would be in the Schedule II list of all the institutions covered by the Act.

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(34) Information Commissioner of Canada, *Proposed Changes to the Access to Information Act*, September 2005, http://www.infocom.gc.ca/specialreports/pdf/Access_to_Information_Act_-_changes_Sept_28_2005E.pdf.

(35) *Restoring Accountability*, Recommendation 16.

(36) The current Schedule II would be repealed.

In order to clarify the issue of records held in ministers' offices, which is currently before the Federal Court (Trial Division), and to explicitly make them subject to disclosure under the Act, the proposal would amend the definition of "government institution" in section 3 to include the offices of heads of federal government departments or ministries of state.

The proposed bill would expand the purpose section of the Act to include the concept of making government institutions accountable to the public, similar to what was proposed in Bills C-462 and C-201. The bill would also make the right of access universal, by permitting any person to be given access to requested records.

The bill would significantly change the exclusions and exemptions currently in place. Cabinet confidences would no longer be excluded, and would become subject to review by the Information Commissioner and the courts if the government claimed an exemption. Under clause 69 of the bill, a mandatory exemption would protect Cabinet confidences for 15 years, but background materials and analyses would be protected for only four years after the related decisions had been made. All exemptions would be subject to a public interest override. All of the existing mandatory class exemptions, including the one dealing with solicitor-client privilege, would be converted into discretionary exemptions subject to an injury test. For example, the mandatory exemption for records related to information obtained from other governments would become a discretionary one, allowing the head of an institution to refuse to disclose a record where "disclosure of the information would be injurious to relations with the government, institution or organization" (clause 13(1)(*b*)).

A proposed new exemption would permit the Canadian Broadcasting Corporation to refuse to disclose "any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the integrity or independence of the institution's newsgathering or programming activities" (clause 16(4)).

The current section 17 of the ATIA creates a discretionary exemption dealing with safety-related concerns. This would be expanded to cover information that could threaten the mental or physical health of individuals, and "that could reasonably be expected to increase the risk of extinction of an endangered species or increase the risk of damage to a sensitive ecological or historic site."

The ATIA's section 21 exemption for advice given to the government would be restricted to cover information that is no more than five years old, and it would be made subject to an injury test. A new subsection (2) would codify case law guidance, distinguishing materials such as surveys, polls, audits, final reports and other factual material from this exemption.

As the Commissioner has consistently recommended, his proposed bill would repeal section 24 and Schedule II.

The proposals would impose obligations on government to monitor the operations of the access to information program and to collect statistics and report annually on the performance of the system. Access to information coordinators would be referred to as "Open Government Coordinators" under the new provisions. These coordinators, along with heads and deputy heads of institutions, would be under a positive duty to ensure, to the extent reasonably possible, that the rights and obligations set out in the Act were respected and discharged by the institution (clause 73.1).

The bill would allow the head of a government institution to extend unreasonable time limits for large requests in certain circumstances. It would require the institution to waive fees in a deemed refusal situation,[37] and permit waiver of fees upon consideration of factors such as whether a record had been previously released, whether a record related to public health or safety or consumer or environmental protection, and whether disclosure would be in the public interest. Heads of institutions could also complain to the Information Commissioner when requests were contrary to the purposes of the Act (clause 30(1)(*d*.2), and with the recommendation of the Commissioner they could disregard such requests.

A unique element of this proposal package is the creation of a legal duty to create appropriate records, along with a corresponding offence for the failure to fulfil that duty (clauses 2.1 and 67(1)(*c*.1)). As the Commissioner explained when he met with the Committee to introduce his proposals in October 2005, this provision is necessary to counteract a growing problem with record-keeping in government. A legal requirement that officials keep appropriate records is necessary in light of "the reality that the right of access is being rendered meaningless by a growing oral culture in government."[38] The proposed bill would also add a duty of government institutions to assist requesters in making their requests (clause 2(3)), a provision that was not present in Bills C-462 and C-201.

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(37) Under section 10(3), where the head of the government institution fails to provide access within a time limit, he or she is deemed to have refused access.

(38) House of Commons Standing Committee on Access to Information, Privacy and Ethics, *Edited Evidence*, 25 October 2005, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId= 134294.

Clause 37.1 would add a provision creating a defence for individuals who might be charged with an offence or other wrongdoing by "disclosing, in good faith to the Information Commissioner, information or records relating to a complaint under this Act."

A proposed amendment to section 54 would require a two-thirds majority of the House of Commons and the Senate in support of an Information Commissioner's appointment.(39) Clause 60.1 would add to the Commissioner's mandate public education, research and advocacy roles. Clause 75 would require a parliamentary review of the administration of the legislation every five years.

The Commissioner did not recommend that his Office be changed from an ombudsman model to a quasi-judicial, order-making body. He argued that the ombudsmodel works effectively, citing that fewer than 1% of complaints end up in the courts, and that based on experience in other jurisdictions, the order-making model would not reduce litigation or improve outcomes.

H. Motion in the House of Commons and the Seventh Report of the House of Commons Standing Committee on Access to Information, Privacy and Ethics

By motion passed in the House of Commons on 15 November 2005,(40) Members agreed that the ATIA should be amended to:

> (*a*) expand coverage of the act to all Crown corporations, all officers of Parliament, all foundations and to all organizations that spend taxpayers' dollars or perform public functions;
>
> (*b*) establish a Cabinet-confidence exclusion, subject to review by the Information Commissioner;
>
> (*c*) establish a duty on public officials to create the records necessary to document their actions and decisions;
>
> (*d*) provide a general public interest override for all exemptions […]; and
>
> (*e*) make all exemptions discretionary and subject to an injury test.

(39) Special majority provisions in Canadian legislation are uncommon, and while they may be effective, there may be an argument that only majority votes of Parliament are constitutional.

(40) Motion carried on division, 15 November 2005, *Journals*, http://www.parl.gc.ca/38/1/parlbus/chambus/house/journals/150_2005-11-15/150Votes-E.html.

Although it did not recommend specific reforms to the Act, the Committee's Seventh Report(41) was intended to communicate to the government, and in particular the Minister of Justice, the Committee's position on the direction the legislative work on reform should take. Preferring not to hold hearings on the Minister's April 2005 Framework, the Committee expressed its preference for legislative action in this report.

Just one week before the dissolution of the 38th Parliament, the Committee reported to the House of Commons, recommending that the Justice Minister consider the advisability of introducing legislation in the House of Commons based on the provisions of the "Open Government Act" proposed by the Information Commissioner.

2006 ELECTION PLATFORMS

In the 2006 election campaign, the Conservative Party of Canada, the NDP and the Bloc Québécois all included proposals to reform the *Access to Information Act* in their platforms. Most of the proposals are covered in the Commissioner's proposed "Open Government Act," except for the Conservative Party's promise to give the Information Commissioner the power to order the release of information.

The commitments made by each party are outlined below. The conclusion to this publication compares the platforms with the other reform proposals discussed above.

A. The Conservative Party of Canada

In its 2006 election platform, the Conservative Party of Canada promised that a Conservative government would strengthen the ATIA. The party's specific commitments are listed below.

- Implement the Information Commissioner's recommendations for reform of the Access to Information Act.
- Give the Information Commissioner the power to order the release of information.

(41) House of Commons Standing Committee on Access to Information, Privacy and Ethics, *Seventh Report*, 21 November 2005, http://www.parl.gc.ca/committee/CommitteePublication.aspx?COM=8998&Lang=1&SourceId=136510.

- Expand the coverage of the act to all Crown corporations, Officers of Parliament, foundations, and organizations that spend taxpayers' money or perform public functions.
- Subject the exclusion of Cabinet confidences to review by the Information Commissioner.
- Oblige public officials to create the records necessary to document their actions and decisions.
- Provide a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government.
- Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules.
- Ensure that the disclosure requirements of the Access to Information Act cannot be circumvented by secrecy provisions in other federal acts, while respecting the confidentiality of national security and the privacy of personal information.(42)

B. The New Democratic Party of Canada

In its 2006 election platform, the NDP promised to improve Canada's freedom of information legislation by:

- Extending the [*Access to Information Act*] to Crown Corporations and agencies now excluded, including incorporated not-for-profit organizations that receive at least two-thirds of their funding from the federal government.
- Making cabinet ministers and their staff subject to the Act.
- Removing unreasonable financial and time barriers to access.
- Specifying which cabinet records must be disclosed or not disclosed.
- Improving public access to third-party contracts and free access to public opinion polling.(43)

C. The Bloc Québécois

The Bloc Québécois promised to present an amended ATIA, containing the following elements:

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(42) Conservative Party of Canada, *Stand Up for Canada: The Conservative Party of Canada Federal Election Platform 2006*, available on-line at http://www.conservative.ca/media/20060113-Platform.pdf.

(43) New Democratic Party of Canada, *Jack Layton: Getting Results for People, Platform 2006*, available on-line at http://www.ndp.ca/ndp-drupal/files/platform-en-final-web.pdf.

- the *Access to Information Act* should cover all Crown corporations and foundations, Officers of Parliament, MPs' offices, ministers' offices, and the Prime Minister's Office;
- confidential Cabinet records should be subject to the Act and to review by the Information Commissioner;
- all exemptions should be subject to a public interest override;
- a clear statement of the roles and responsibilities of access to information coordinators;
- the establishment of incentives to respect deadlines in processing requests;
- a broader mandate for the Information Commissioner;
- public officials should be required to create records that document their decisions, actions, considerations and analyses;
- consultants should be required to produce a deliverable that confirms what work has been done.(44)

CONCLUSION

A review of the major proposals for reform of Canada's access to information legislation, put forward during the Act's 23 years of operation, indicates several key features upon which there appears to be consensus, and also some on which the various reviewers have retained important differences of opinion.

All of the proposals, in broad terms, agreed on the need to expand the scope of the Act, to restrict exclusions and exemptions from the Act's coverage, and to reduce or eliminate the mandatory statutory exemptions currently provided under section 24 and in Schedule II. Within those broad areas of agreement, however, some important distinctions remain.

All three legislative proposals considered in this paper recommended changing the name of the Act to the "Open Government Act" to emphasize the purpose of the legislation. In the same spirit, they proposed the expansion of the "purpose" section of the Act to refer to the government's obligation to release information needed by Canadians.

In terms of expanding the scope of the Act, almost all the reports covered here recommended that the Act provide universal access to records, and none specifically rejected the

(44) Bloc Québécois, *Plateforme électorale, campagne 2005-2006*, available on-line at http://www.bloc.org/archivage/plateforme_2005-2006.pdf [translation].

extension to all persons, wherever located.(45) All of the proposals included recommendations to extend the Act's coverage to more institutions, all agreeing that at least some Crown corporations should be brought under the Act. Most agreed that most Officers of Parliament should be included, as well as Parliament itself, except for the offices of individual Members of Parliament and Senators.(46) There is consensus that the judiciary should not be subject to the right of access.

Most of the proposals considered here recommended converting the current exclusion of Cabinet records or confidences into an exemption, and making decisions about refusals to disclose documents reviewable by the Information Commissioner,(47) or the courts, or both. The Minister of Justice's Framework, however, recommended retaining the exclusion of Cabinet confidences, while defining them more narrowly and permitting the Federal Court to review the relevant determinations.(48) All but the *ad hoc* Committee would have created a mandatory class exemption, protecting all such records from disclosure; the *ad hoc* Committee recommended that an injury-based discretionary exemption be created to preserve the confidentiality of Cabinet deliberations.(49) All except the April 2005 Framework proposed that Cabinet confidences be protected for a period of 15 years, rather than the current 20.(50)

Most of these reports included a recommendation to repeal section 24 and Schedule II of the ATIA. The *ad hoc* Committee did not deal with the issue, and only the Minister of Justice, in his Framework paper, recommended that the provisions be retained. The Framework did propose that criteria should be established in order to reduce the number of statutory provisions on the Schedule II list.

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(45) Bills C-462 and C-201 did not include such an amendment, and the recommendations of the *ad hoc* Committee did not address this issue.

(46) Bills C-462 and C-201 would not have brought Parliament under the Act, and the Minister of Justice's April 2005 Framework urged the Committee to undertake consultation with affected parties about the potential addition of Parliament and Officers of Parliament.

(47) The Task Force would have excluded the Commissioner from review of these decisions, reserving such review to the courts.

(48) While the Conservative Party used the word "exclusion" in relation to Cabinet records ("Subject the exclusion of Cabinet confidences to review by the Information Commissioner"), the option of review by the Commissioner suggests that it is recommending that the exclusion be converted into an exemption.

(49) *A Call to Openness*, Recommendation 6.

(50) The Task Force found the reduced period of 15 years reasonable and asked the government to consider the reduction; see Recommendation 4-6.

Several other issues were less consistently supported. For example, the *ad hoc* Committee and the Information Commissioner have both recommended that the amended Act provide for parliamentary review of its operation every five years.(51) The concept of a general public interest override was first endorsed by the Information Commissioner in his proposed "Open Government Act." Recognition of the Commissioner's public education role and the role of access to information coordinators(52) was proposed by the Information Commissioner, the Task Force, and the Justice Committee in its 1986 report. They also recommended that new provisions provide for the elimination or waiver of some fees and a power to refuse frivolous or vexatious requests. The Minister of Justice's Framework raised a new question of whether section 23 (solicitor-client privilege) should be amended to create a new exemption to protect "mediation privilege" in order to protect the confidentiality necessary to permit mediation to work effectively.(53)

The creation of a positive duty requiring government officials and employees to document their decisions, actions, advice and recommendations was advocated by the Information Commissioner and included in his 2005 draft bill, and was endorsed in the Conservative Party and Bloc Québécois platforms. This recommendation was highlighted by the Commissioner as one of his most important, as he intended it to reverse the move toward an oral culture of decision-making in government, which he argued has frustrated the goal of promoting openness that underlies the access legislation. The Conservative platform not only endorsed the Commissioner's proposed "Open Government Act," but went beyond it to recommend that the Information Commissioner be given the power to order the release of information. The potential for changing the Commissioner's ombudsman model in favour of an order-making one was discussed as an idea meriting consultation or study by the Task Force, in its June 2002 report, and by the Minister of Justice in the Framework paper.

A number of provinces have adopted an adjudicative, rather than ombudsman, model for their information and privacy commissioners. As noted in the Framework, transforming the Office of the Information Commissioner to a quasi-judicial decision-maker

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(51) *Open and Shut* called for a parliamentary review of the ATIA and the *Privacy Act* within four years after the tabling of the report.

(52) The Task Force recommended that the role of access coordinators be recognized in the *Access to Information Policy and Guidelines*, rather than in the statute.

(53) Justice Canada (2005), pp. 21-22.

would affect the administration of the Commissioner's office, and the government has not thus far been convinced that there is a need for such a shift. In his appearance before the Standing Committee in October 2005, Commissioner John Reid agreed, making the following argument in defence of his current ombudsman role:

> There is no evidence that order powers would strengthen the right of access, speed up the process, or reduce the amount of secrecy. The experience of 22 years is that the ombudsman model works very well. Fewer than 1% of complaints end up before the courts. The experience in the jurisdictions that have order powers is that they rely heavily on the ombudsman approach, reserving the order-making role for the rare tough cases.(54)

The NDP and Bloc platforms on the subject of access legislation reform are also consistent with the Commissioner's proposed "Open Government Act." One area that is not clear, however, is the import of the NDP proposal to make cabinet ministers and their staff subject to the Act. Presumably this proposal refers to the issue of records in ministers' offices that was raised in the Framework paper, and is the subject of litigation in which the Information Commissioner is involved. As mentioned above, the Commissioner's proposed bill would address this possible gap by amending the definition of government institution to expressly include the offices of heads of institutions. It is likely not intended that ministers' personal or political papers be made subject to release under the Act.

The Conservative, NDP and Bloc platforms all proposed significant changes that would favour increased openness in government, a direction that is in keeping with most of the proposals to reform the Act that have emerged over the last two decades. The exact form of any government legislative proposal flowing from those commitments has yet to be seen, but the major elements of the package, if it resembles those election platforms, can find solid support in the reports discussed in this paper.

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(54) House of Commons Standing Committee on Access to Information, Privacy and Ethics, *Edited Evidence*, 25 October 2005, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId= 134294.