



HOUSE OF COMMONS  
CHAMBRE DES COMMUNES  
CANADA

## **REVIEW OF THE *ACCESS TO INFORMATION ACT***

### **Report of the Standing Committee on Access to Information, Privacy and Ethics**

**Blaine Calkins  
Chair**

**JUNE 2016**

**42<sup>nd</sup> PARLIAMENT, 1<sup>st</sup> SESSION**

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# **STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS**

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# **THE STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS**

has the honour to present its

## **SECOND REPORT**

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the *Access to Information Act* and has agreed to report the following:





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# REVIEW OF THE *ACCESS TO INFORMATION ACT*

## CHAPTER 1: INTRODUCTION

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### 1.1 MANDATE

On 23 February 2016, the House of Commons Standing Committee on Access to Information, Privacy and Ethics (“the Committee”) agreed to the following motion:

That, pursuant to Standing Order 108(3)(h)(i) the Committee undertake a study on the *Access to Information Act*.

The Committee began its study on 25 February. It held 12 meetings during which it heard from 41 witnesses. It also received eight briefs.

The Committee wishes to thank all those who participated in this report, including the witnesses, the interpreters, the committee staff, the analysts, the translators and the publications team.

### 1.2 REVIEW OF THE *ACCESS TO INFORMATION ACT*

The *Access to Information Act* (the “Act”), which came into force in 1983, provides Canadians with the right to access to information in records under the control of government institutions. In 2006, the *Federal Accountability Act* extended coverage to about 70 institutions, including officers of Parliament and Crown corporations and their wholly owned subsidiaries. It also introduced a duty to assist requesters.<sup>2</sup>

In March 2015, the Information Commissioner of Canada, Suzanne Legault, submitted a special report to Parliament entitled *Striking the Right Balance for Transparency — Recommendations to Modernize the Access to Information Act*,<sup>3</sup> in which she made 85 recommendations.

In November 2015, Prime Minister Rt. Hon. Justin Trudeau made public the mandate letter to the President of the Treasury Board, Hon. Scott Brison, in which he established the following priority:

Work with the Minister of Justice to enhance the openness of government, including leading a review of the *Access to Information Act* to ensure that Canadians have easier

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1 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Minutes of Proceedings](#), 1st Session, 42nd Parliament, 23 February 2016.

2 Office of the Information Commissioner of Canada, [A New Direction: Annual Report 2007-2008](#).

3 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), March 2015.

access to their own personal information, that the Information Commissioner is empowered to order government information to be released and that the Act applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts.<sup>4</sup>

On 31 March, Minister Brison announced that reform of the access to information framework would follow a two-phase process. During the first phase, the government will implement the following commitments, as well as other improvements identified by the Committee and through consultations:

- giving the Information Commissioner the power to order government information to be released;
- ensuring the Act applies appropriately to the Prime Minister's and Ministers' Offices;
- and it also applies to administrative institutions that support Parliament and the courts.<sup>5</sup>

On 5 May, Minister Brison issued an *Interim Directive on the Administration of the Access to Information Act* in which government officials were directed to:

- waive all Access to Information fees apart from the \$5 filing fee, and
- release information in user-friendly formats (e.g. spreadsheets), whenever possible.<sup>6</sup>

During his appearance before the Committee the same day, Minister Brison said the government plans to implement a mandatory five-year review of the Act, address the problem of frivolous and vexatious requests and improve performance reporting.<sup>7</sup> He also said the second phase of the reform of the Act will be a full legislative review, to be completed in 2018.<sup>8</sup>

### 1.3 THE NEED FOR REFORM

Witnesses who appeared before the Committee generally agreed that the Act is due for reform. Mr. Toby Mendel, Executive Director for the Centre for Law and

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4 Office of the Prime Minister, "[President of the Treasury Board of Canada Mandate Letter](#)," 13 November 2015.

5 Scott Brison, President of the Treasury Board, "[Speaking notes for the Honourable Scott Brison, President of the Treasury Board to the Canadian Open Dialogue Forum 2016](#)," Ottawa, 31 March 2016.

6 Government of Canada, "[Government of Canada improves Access to Information](#)," News release, 5 May 2016.

7 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 5 May 2016, 0850 (Hon. Scott Brison, President of the Treasury Board).

8 Ibid., 0855.

Democracy, talked about his organization's rating system for assessing legal frameworks for the right to information. Based on this system, he said that Canada scored 79 points out of a possible 150 points and that it ranked 59<sup>th</sup> out of 102 countries that had been rated.<sup>9</sup>

Sean Holman, Vice-President of the Canadian Association of Journalists, argued that Canada has always been a laggard in freedom of information and that the Act fortified secrecy.<sup>10</sup> He was supported by Aaron Wudrick, Federal Director of the Canadian Taxpayers Federation.<sup>11</sup> Duff Conacher, Coordinator of Democracy Watch, expressed a similar opinion.<sup>12</sup> Ken Rubin, a public interest researcher, called for "basic structural change."<sup>13</sup>

Mark Weiler, a web and user experience librarian, who was more supportive of the current Act, said that it needs improvements.<sup>14</sup> Michel Drapeau, retired Colonel and a lawyer who specializes in access to information and privacy law, argued that the problems in the access-to-information system were not as a result of the Act being defective, but were due to the lack of motivation on the part of federal institutions and the absence of oversight to hold institutions to account.<sup>15</sup>

The Committee is of the opinion that the Act is due for reform, and decided to focus on the following areas:

- Extending coverage, particularly criteria for adding institutions and Parliament;

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9 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0905 (Toby Mendel, Executive Director, Centre for Law and Democracy).

10 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0845 (Sean Holman, Vice-President, Canadian Association of Journalists).

11 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0855 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).

12 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0900 (Duff Conacher, Coordinator, Chairperson of Open Government Coalition, Democracy Watch).

13 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0855 (Ken Rubin, Public Interest Researcher, as an individual).

14 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0910 (Mark Weiler, Web and User Experience Librarian, as an individual).

15 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0845 (Michel Drapeau, Professor, University of Ottawa, Faculty of Common Law, as an individual).

- The right of access, particularly the duty to document, frivolous and vexatious requests, the format of information and fees;
- Timelines, particularly legislated times for extensions;
- Maximizing disclosure, particularly replacing exclusions with exemptions, advice and recommendations and Cabinet confidences;
- Strengthening oversight, particularly the strengths and weaknesses of different oversight models;
- Open information, particularly the obligation to publish information of public interest;
- The mandatory periodic review of the Act;
- The role of access to information and privacy (ATIP) coordinators; and
- The Office of the Information Commissioner.

## CHAPTER 2: EXTENDING COVERAGE

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In Chapter 1 of her report, the Commissioner stressed that, although the Act applies to some 250 institutions, not all entities “that spend taxpayers’ money or perform public functions” are subject to it.<sup>16</sup>

### 2.1 CRITERIA FOR ADDING INSTITUTIONS

The Commissioner stated that “[t]he use of criteria as a way to determine which entities should be subject to the Act is a rational approach to coverage, as it promotes predictability with respect to which entities are subject to the Act.”<sup>17</sup> Moreover, it guarantees that institutions performing similar functions are also subject to the Act.<sup>18</sup> The Commissioner made the following recommendation:

#### Recommendation 1.1

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

- institutions publicly funded in whole or in part by the Government of Canada (including those with the ability to raise funds through public borrowing) (this would include traditional departments but also other organizations such as publicly funded research institutions);
- institutions publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);
- institutions that perform a public function, including those in the areas of health and safety, the environment, and economic security (such as NAV CANADA, which is Canada’s civil air navigation service provider);
- institutions established by statute (such as airport authorities); and
- all institutions covered by the *Financial Administration Act*.<sup>19</sup>

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16 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), special report, March 2015, p.8.

17 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), [Submission to ETHI on Recommendation 1.1: Criteria for Coverage](#).

18 Ibid.

19 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), special report, March 2015, p.9.

The Commissioner also provided further details to the Committee regarding her Recommendation 1.1, specifically regarding the funding criteria for institutions and institutions that perform a public function.<sup>20</sup>

### **2.1.1 Institutions that are publicly funded in part by the Government of Canada**

First of all, with respect to institutions that are publicly funded in part by the Government of Canada, the Commissioner set out three options for determining whether an institution would be subject to the Act.

Option A: the institution receives a loan, grant or contribution of \$5 million or more: The threshold of \$5 million or more was based in particular on the fact that, “[i]n the Main Estimates, expenditures, grants and contributions equal to or in excess of five million dollars are voted on as separate line items.”<sup>21</sup>

Option B: 50% or more of an institution’s funding comes directly or indirectly from the federal government: this is the approach used in Denmark and Serbia.

Option C: a combination of a percentage of funding and an absolute threshold:<sup>22</sup> Under this option, an institution would be subject to the Act if:

- Either the entity receives a certain percentage of its funding from the federal government; or
- An absolute threshold, higher than five million dollars, of public funding is met.<sup>23</sup>

According to the Commissioner, this option “would be suitable if the committee believes that five million dollars as proposed under Option A is too low a threshold”<sup>24</sup> and “[t]his option would also address one of the drawbacks of Option B, which is that there are some circumstances where the 50% threshold of funding would not be met, even though substantial sums of public funding are provided to an entity by the federal government.”<sup>25</sup>

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20 Office of the Information Commissioner of Canada, *Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act*, [Submission to ETHI on Recommendation 1.1: Criteria for Coverage](#).

21 Ibid.

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid.



With respect to the application of the Act to Aboriginal groups, the Commissioner argued that specific consultations should be held with these groups pursuant to section 35 of the *Canadian Charter of Rights and Freedoms*.<sup>26</sup>

### **2.1.2 Institutions that perform a public function**

According to the Commissioner, the criterion applicable for institutions that perform a public function is intended “to ensure that the way in which an entity is constituted or funded does not preclude it from coverage under the Act, especially when its function is, for all intents and purposes, public in nature”<sup>27</sup> and “ensures that entities that act for the benefit of the public interest are subject to appropriate transparency and accountability mechanisms,”<sup>28</sup> even if certain services are privatized.

To determine whether an institution performs a public function, the Commissioner recommends “looking at the nature of the operations undertaken by the entity,” while bearing in mind a number of factors, including the following:

- Is the entity performing a public function on behalf of the federal government within one of its areas of responsibility, such as health and safety, the environment and economic security?
- Does the entity have the authority to regulate or set standards within a sphere of federal responsibility?
- Is the entity tasked with executing a public policy on behalf of the federal government?<sup>29</sup>

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26 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0940 (Suzanne Legault, Information Commissioner of Canada).

27 Office of the Information Commissioner of Canada, *Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act*, [Submission to ETHI on Recommendation 1.1: Criteria for Coverage](#).

28 Ibid.

29 Ibid.

### 2.1.3 Views of witnesses who appeared before the Committee

A number of the witnesses who appeared before the Committee supported the Commissioner's Recommendation 1.1. First, Mr. Marleau, former information commissioner and former clerk of the House of Commons, and Mr. Wudrick stated that, when taxpayers' money is spent, the information should be accessible, in the interest of government transparency.<sup>30</sup>

Mr. Conacher added that the Act should automatically apply to all institutions receiving public funding or that serve a public function, and that they should not have to be added in a schedule. Mr. Mendel also expressed concern about "the limited nature of the schedule 1 list of public bodies that is not regularly updated as the nature of those public bodies change."<sup>31</sup> Finally, Vincent Gogolek of the B.C. Freedom of Information and Privacy Association also noted that, in many countries, organizations subject to access to information laws are not listed in schedules and that those laws instead stipulate the criteria for determining the types of organizations subject to them.<sup>32</sup>

Mr. Mendel also added with respect to access to information legislation that "a lot of countries cover publicly funded bodies and bodies that perform a public function" and that this does not pose a problem for bodies in those countries.<sup>33</sup> He stated nonetheless that the Act should only apply to those functions "that were performed under that public funding."<sup>34</sup> Similarly, Mr. Wudrick stated that organizations that receive a substantial contribution "should be treated more and more like a regular government body"<sup>35</sup> as regards access to information.

Clyde Wells, who was a member of the Independent Statutory Review Committee in Newfoundland and Labrador, noted that when institutions are funded in part by the government, the government "would require that organization to report to government

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30 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0855 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation). House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0955 (Robert Marleau, Former Information Commissioner of Canada, as an individual).

31 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0935 (Toby Mendel, Executive Director, Centre for Law and Democracy).

32 BC Freedom of Information and Privacy Association Brief, [Reform of the Access to Information Act: Past time for Action](#).

33 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 1000 (Toby Mendel, Executive Director, Centre for Law and Democracy).

34 Ibid.

35 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0920 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).

exactly what it did with the money and government would report to the public.”<sup>36</sup> He said that citizens should be able to request such information from the government.<sup>37</sup>

#### **2.1.4 The Committee’s recommendation**

The Committee agrees that the Act should include criteria for determining whether institutions should be subject to it. The Committee therefore recommends:

##### **RECOMMENDATION 1**

**That in the first phase of the reform of the *Access to Information Act*, the Act be amended in order to identify the institutions subject to the Act according to criteria, which shall include the following:**

- **institutions that are publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);**
- **institutions that perform a public function, including those that meet one of the following criteria:**
  - 1. The institution performs a public function for the federal government in one of its areas of jurisdiction, such as health and safety, the environment and economic security;**
  - 2. The institution has the power to establish regulations or standards in an area of federal jurisdiction;**
  - 3. The institution is responsible for carrying out a public policy on behalf of the federal government;**
- **institutions established by statute (such as airport authorities);**
- **all institutions covered by the *Financial Administration Act*.**

However, the Committee did not hear sufficient evidence to be able to form an opinion regarding the criteria that should apply to publicly funded institutions. It therefore recommends:

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36 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 31 May 2016, 1045 (Clyde Wells, Member, Independent Statutory Review Committee, as an individual).

37 Ibid.

## RECOMMENDATION 2

**That in the second phase of the reform of the *Access to Information Act*, further consideration be given as to how the Act should apply to institutions that are publicly funded by the Government of Canada.**

### 2.2 MINISTERS' OFFICES

Appearing before the Committee, the Commissioner stated that in 2011 “the Supreme Court of Canada determined that ministers' offices are not institutions covered by the Act.”<sup>38</sup> The Commissioner pointed out, however, that decisions by ministers can have significant impacts on Canadians and that they should be accountable to the public.<sup>39</sup> In her report, the Commissioner made the following recommendations:

#### Recommendation 1.2

The Information Commissioner recommends extending coverage of the Act to the Prime Minister's Office, offices of ministers and ministers of State, and parliamentary secretaries.<sup>40</sup>

#### Recommendation 1.3

The Information Commissioner recommends creating an exemption in the Act for information related to the parliamentary functions of ministers and ministers of State, and parliamentary secretaries as members of Parliament.<sup>41</sup>

Before the Committee, the Commissioner spoke about the scope of Recommendations 1.2 and 1.3 and made several links to her Recommendations 4.26 and 4.27, which pertain to the mandatory exemption of Cabinet confidences from the Act when disclosure would reveal the substance of Cabinet deliberations. This topic is covered in Chapter 5 of this report.

Finally, with respect to Recommendation 1.3, the Commissioner noted in her report that the Board of Internal Economy's *Members' By-Laws* define parliamentary functions as follows:

“parliamentary functions” in relation to a Member, means the duties and activities that relate to the position of Member, wherever performed and whether or not performed in a partisan manner, namely, participation in activities relating to the proceedings and work

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38 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 25 February 2016, 0850 (Suzanne Legault, Information Commissioner of Canada); [Canada \(Information Commissioner\) v. Canada \(Minister of National Defence\)](#), [2011] 2 S.C.R. 306.

39 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, 1st Session, 42nd Parliament, 25 February 2016, 0850 (Suzanne Legault, Information Commissioner of Canada).

40 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), special report, March 2015, p.11.

41 Ibid.

of the House of Commons and activities undertaken in representing his or her constituency or constituents.<sup>42</sup>

Mr. Marleau, Mr. Holman, Mr. Gogolek, Mr. Aylwin and Mr. Rubin maintained that the Act should apply to ministers' offices, as the Commissioner recommended.<sup>43</sup>

The Committee also agrees that the Act should apply to the Prime Minister's Office, to offices of ministers and ministers of State, and parliamentary secretaries. The Committee therefore recommends:

### **RECOMMENDATION 3**

**That in the first phase of the reform of the *Access to Information Act*, the Act be extended to include the Prime Minister's Office, offices of ministers and ministers of State, and parliamentary secretaries, except in regards to their parliamentary functions.**

## **2.3 PARLIAMENT**

In her report and appearing before the Committee, the Commissioner pointed out that Parliament is not subject to the Act even though the combined budget of the House of Commons, the Senate and the Library of Parliament was over \$500 million, according to the 2014—2015 Main Estimates.<sup>44</sup> The Commissioner therefore made the following recommendations:

#### Recommendation 1.4

The Information Commissioner recommends extending coverage of the Act to the bodies that support Parliament, such as the Board of Internal Economy, the Library of

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42 [Members By-Law](#), Board of Internal Economy, s.1(1).

43 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0850 (Robert Marleau, Former Information Commissioner of Canada, as an individual); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0850 (Vincent Gogolek, Executive Director, B.C. Freedom of Information and Privacy Association); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0850 (Antoine Aylwin, Partner, as an individual); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0850 (Sean Holman, Vice-President, Canadian Association of Journalists); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0900 (Ken Rubin, Public Interest Researcher, as an individual).

44 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0850 (Suzanne Legault, Information Commissioner of Canada); Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), special report, March 2015, p.11.

Parliament, the Conflict of Interest and Ethics Commissioner and the Senate Ethics Commissioner.<sup>45</sup>

#### Recommendation 1.5

The Information Commissioner recommends creating a provision in the Act to protect against an infringement of parliamentary privilege.<sup>46</sup>

Appearing before the Committee, the Commissioner stressed the importance of protecting parliamentary privilege and preventing any infringement of it. She stated that the Act does not currently provide any such protection.<sup>47</sup> The Commissioner stated that consultations with parliamentary officials who are specialists in their field would be necessary in order to develop a provision covering Parliament.<sup>48</sup>

In her report, the Commissioner states that “[p]arliamentary privilege is the collective and individual rights accorded to parliamentarians to ensure they are able to carry out their functions and perform their duties without obstruction. The privilege is protected by the Constitution and extends to all matters relating to parliamentary proceedings.”<sup>49</sup> The Commissioner’s report also notes that the access to information laws of Newfoundland and Labrador, the United Kingdom and India include protection of parliamentary privilege.<sup>50</sup>

With respect to the Board of Internal Economy of the House of Commons, the Commissioner noted further that the *Parliament of Canada Act* includes some protection and that those provisions should be addressed when a new provision for the Act is

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45 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), special report, March 2015, p.12.

46 Ibid.

47 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, 1st Session, 42<sup>nd</sup> Parliament, 25 February 2016, 0920 (Suzanne Legault, Information Commissioner of Canada); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42<sup>nd</sup> Parliament, 19 May 2016, 0945 (Suzanne Legault, Information Commissioner of Canada).

48 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42<sup>nd</sup> Parliament, 19 May 2016, 0945 (Suzanne Legault, Information Commissioner of Canada).

49 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), special report, March 2015, p.12, note 18; it should be noted that the Access to Information Review Task Force report of June 2002 entitled [Access to Information: Making it Work for Canadians](#), which had the mandate “to review all aspects of the federal government’s access to information (ATI) regime, and to make recommendations on how it might be improved” defines parliamentary privilege in the same way. This report also stated that “this protection is necessary to ensure that the Senate and House of Commons function independently and effectively. Nor should the Act apply to the information of political parties or their caucuses, or to the personal, political and constituency records of individual Senators and Members of the House of Commons.”

50 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), special report, March 2015, p.12, note 19.

developed.<sup>51</sup> During the Committee's study, the Commissioner did not comment further on how the Act should apply to the Board of Internal Economy.

A number of witnesses, including Mr. Wudrick, Mr. Rubin, Mr. Drapeau, Mr. Marleau and Mr. Conacher, supported the Commissioner's recommendation that Parliament should be subject to the Act.<sup>52</sup> Mr. Marleau stressed the importance of protecting parliamentary privilege in a separate part of the Act: "I think it has to be articulated fairly carefully in terms of protecting parliamentary privilege, your legislative function, your function as a member in the constituency documents, that sort of thing has to be included."<sup>53</sup>

Moreover, Mr. Marleau expressed some concern about the Commissioner being able to make orders that are binding on Parliament, if she is granted such powers:

I have some concerns about order-making powers by the commissioner to Parliament. You have a creature of Parliament now ordering Parliament. I think you'd have to set up in a separate part of the statute an independent review outside of Federal Court for parliamentary privilege. I would suggest at the outset appoint a retired Supreme Court judge who would be there to review any order he or she may make that might contravene the intention for parliamentary privilege.<sup>54</sup>

The Committee is also in favour of expanding the scope of the Act to include Parliament. The Committee therefore recommends:

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51 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0945 (Suzanne Legault, Information Commissioner of Canada).

52 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0855 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0955 (Robert Marleau, Former Information Commissioner of Canada, as an individual); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0900 (Ken Rubin, Public Interest Researcher, as an individual); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0905 (Duff Conacher, Coordinator, Chairperson of Open Government Coalition, Democracy Watch); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42<sup>nd</sup> Parliament, 12 April 2016, 0850 and 0935 (Michel Drapeau, Professor, University of Ottawa, Faculty of Common Law, as an individual).

53 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0955 (Robert Marleau, Former Information Commissioner of Canada, as an individual).

54 *Ibid.*, 1000.

#### **RECOMMENDATION 4**

**That in the first phase of the reform of the *Access to Information Act*, the scope of the Act be extended to include organizations that support Parliament, such as the Board of Internal Economy, the Library of Parliament, the Conflict of Interest and Ethics Commissioner and the Senate Ethics Officer.**

#### **RECOMMENDATION 5**

- A. That a new provision be created in the Act in order to prevent any infringement of parliamentary privilege.**
- B. That the Government of Canada consult the organizations that support Parliament, specifically, the Clerk of the Senate, the Clerk of the House of Commons and the Parliamentary Librarian, in order to determine the content of the new provision protecting parliamentary privilege and to ensure that this new provision effectively protects parliamentary privilege.**

#### **RECOMMENDATION 6**

**That a separate and specific part of the Act be created pertaining to the application of the Act to organizations that support Parliament.**

#### **RECOMMENDATION 7**

**That the Government of Canada consult the organizations that support Parliament, specifically, the Clerk of the House of Commons, to determine the extent to which the Act should apply to the Board of Internal Economy.**

#### **RECOMMENDATION 8**

**That Parliament determine the appropriate process for the independent review of the application of the provisions protecting parliamentary privilege.**

## **2.4 COURTS**

The Commissioner told the Committee that the bodies that provide administrative support to the courts are not subject to the Act even though they have substantial budgets.<sup>55</sup> In her report, the Commissioner therefore made the following recommendations:

Recommendation 1.6

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55 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0850 (Suzanne Legault, Information Commissioner of Canada).



The Information Commissioner recommends extending coverage of the Act to the bodies that provide administrative support to the courts, such as the Registry of the Supreme Court, the Courts Administration Service, the Office of the Commissioner for Federal Judicial Affairs and the Canadian Judicial Council.<sup>56</sup>

#### Recommendation 1.7

The Information Commissioner recommends that the Act exclude records in court files, the records and personal notes of judges, and communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity.<sup>57</sup>

While a number of witnesses were in favour of expanding the application of the Act, few of them commented specifically on the Commissioner's recommendation to expand the application of the Act to include bodies that provide administrative support to the courts. Mr. Drapeau did, however, support this recommendation<sup>58</sup> and Mr. Marleau pointed out that the Committee had embraced this recommendation in 2009.<sup>59</sup>

The Committee supports this recommendation by the Commissioner and therefore recommends:

### **RECOMMENDATION 9**

**That in the first phase of the reform of the *Access to Information Act*, the application of the Act be extended to include bodies providing administrative support to the courts, such as the Registrar of the Supreme Court of Canada, the Courts Administration Service, the Office of the Commissioner for Federal Judicial Affairs Canada and the Canadian Judicial Council, except in regards to court files, the records and personal notes of judges, as well as communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity.**

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56 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), special report, March 2015, p.13.

57 Ibid.

58 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0935 (Michel Drapeau, Professor, University of Ottawa, Faculty of Common Law, as an individual).

59 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0845 (Robert Marleau, Former Information Commissioner of Canada, as an individual); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [The Access to Information Act: First Steps Toward Renewal](#), Report, 40th Parliament, 2nd Session, June 2009.



# CHAPTER 3: THE RIGHT OF ACCESS

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## 3.1 THE DUTY TO DOCUMENT

In her Report, the Information Commissioner recommended the following:

### Recommendation 2.1

The Information Commissioner recommends establishing a comprehensive legal duty to document, with appropriate sanctions for non-compliance.<sup>60</sup>

As explained by Jennifer Dawson, Deputy Chief Information Officer with the Treasury Board Secretariat, the duty to document is a government policy that “requires public servants to document decisions and decision-making as well as activities.”<sup>61</sup>

In her testimony, the Commissioner said, “there is documented evidence of serious breaches by the public service of its obligation to create and preserve information of business value.”<sup>62</sup> Consequently, she recommended that priority be given to a comprehensive legal duty to document with appropriate sanctions for non-compliance.<sup>63</sup>

The access to information and privacy commissioners from Quebec, Ontario, Alberta, and Newfoundland and Labrador all agreed with the need for a legal duty to document.<sup>64,65,66,67</sup> Mr. Marleau said that the duty to document is

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60 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), March 2015.

61 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2016, 0910 (Jennifer Dawson, Deputy Chief Information Officer, Treasury Board Secretariat).

62 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 25 February 2016, 0850 (Suzanne Legault, Information Commissioner of Canada).

63 Ibid, 0850.

64 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0940 (Diane Poitras, Vice-president, Commission d'accès à l'information du Québec).

65 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0940 (Brian Beamish, Information and Privacy Commissioner of Ontario).

66 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0940 (Jill Clayton, Information and Privacy Commissioner of Alberta).

67 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0915 (Sean Murray, Director of Special Projects, Office of the Information and Privacy Commissioner of Newfoundland and Labrador).

overdue.<sup>68</sup> Other witnesses who supported the establishment of a legal duty to document included Mr. Holman,<sup>69</sup> Mr. Wudrick,<sup>70</sup> Mr. Rubin,<sup>71</sup> Mr. Gogolek<sup>72</sup> and Mr. Conacher.<sup>73</sup>

During his appearance before the Committee, Minister Brison said, “this is something that could be addressed as part of the legislative changes.”<sup>74</sup>

The Committee is strongly in favour of there being a legal requirement to document the decision-making process and believes that this requirement should be instituted as quickly as possible. It therefore recommends:

### **RECOMMENDATION 10**

**That in the first phase of the reform of the *Access to Information Act*, the Act be amended to establish a comprehensive legal duty to document, with appropriate sanctions for non-compliance.**

### **3.2 EXTENDING ACCESS**

Under the Act, only Canadian citizens, permanent residents, and individuals and corporations present in Canada have the right of access to government records.<sup>75</sup> In her report the Information Commissioner said that this complicates the process and limits the free flow of information. She made the following recommendation:

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- 68 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0850 (Robert Marleau, former Information Commissioner of Canada, as an individual).
- 69 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0850 (Sean Holman, Vice-President, Canadian Association of Journalists).
- 70 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0855 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).
- 71 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0900 (Ken Rubin, Public Interest Researcher, as an individual).
- 72 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0850 (Vincent Gogolek, Executive Director, B.C. Freedom of Information and Privacy Association).
- 73 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0900 (Duff Conacher, Coordinator, Chairperson of Open Government Coalition, Democracy Watch).
- 74 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 5 May 2016, 0915 (Hon. Scott Brison, President of the Treasury Board).
- 75 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), March 2015.

### Recommendation 2.3

The Information Commissioner recommends extending the right of access to all persons.<sup>76</sup>

This recommendation was supported by Mr. Mendel, who pointed out that it would increase efficiency since officials would not have to determine whether the requester is a Canadian citizen or resident.<sup>77</sup> Mr. Holman,<sup>78</sup> Mr. Weiler<sup>79</sup> and Mr. Marleau<sup>80</sup> also supported extending access to all.

On the other hand, Minister Brison said that his instinct is “that our priority will be citizens of Canada.”<sup>81</sup> Mr. Drapeau<sup>82</sup> and Mr. Wudrick<sup>83</sup> also said that priority should be given to Canadians.

The Committee heard testimony from some government officials that extending the right of access to all could lead to an increase in the number of requests. In particular, Stefanie Beck, Assistant Deputy Minister for Corporate Services with the Department of Immigration, Refugees and Citizenship, said the Department processes millions of citizenship applications every year. Most of the access to information requests the Department receives relate to the status of those applications. She said: “If all of those people abroad had the right to access that information, we wouldn't be looking at 40,000 [access to information] requests a year, we would be looking at many more than that.”<sup>84</sup> She also said that if people abroad no longer had to go through a Canadian

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76 Ibid.

77 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0955 (Toby Mendel, Executive Director, Centre for Law and Democracy).

78 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0955 (Sean Holman, Vice-President, Canadian Association of Journalists).

79 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0930 (Mark Weiler, Web and User Experience Librarian, as an individual).

80 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0845 (Robert Marleau, former Information Commissioner of Canada, as an individual).

81 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 5 May 2016, 0925 (Hon. Scott Brison, President of the Treasury Board).

82 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0955 (Michel Drapeau, Professor, University of Ottawa, Faculty of Common Law, as an individual).

83 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0920 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).

84 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 22 March 2016, 0905 (Stefanie Beck, Assistant Deputy Minister, Corporate Services, Department of Immigration, Refugees and Citizenship).

representative, it could lead to a large influx of requests, which “could impact our ability to meet legislated compliance deadlines.”<sup>85</sup>

Larry Surtees, Corporate Secretary with the Department of National Defence, noted that releasing documents that contain sensitive information to foreigners could put peoples’ lives at risk and that the department makes sure that it does “the job properly to prevent that.”<sup>86</sup>

Robert Mundie, Director General of the Corporate Secretariat with the Canada Border Services Agency, said it would be difficult to estimate the number of access to information requests that would result from extending access.<sup>87</sup> Monique McCulloch, Director of Access to Information and Privacy for Shared Services Canada, said she did not think that extending access to all would have a direct impact.<sup>88</sup>

Given the witnesses’ lack of consensus on the issue, the Committee recommends:

### **RECOMMENDATION 11**

**That extending the right of access to all persons be considered in the second phase of the reform of the *Access to Information Act*.**

## **3.3 FRIVOLOUS AND VEXATIOUS REQUESTS**

In her report, the Information Commissioner addressed the issue of frivolous and vexatious requests, which, while rare, “can place a strain on public resources, delay delivery of other services and have a negative impact on the rights of other requesters.”<sup>89</sup> She made the following recommendations:

#### Recommendation 2.4

The Information Commissioner recommends that institutions be allowed to refuse to process requests that are frivolous, vexatious or an abuse of the right of access.<sup>90</sup>

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85 Ibid., 0850.

86 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 22 March 2016, 0940 (Larry Surtees, Corporate Secretary, Department of National Defence).

87 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 1015, (Robert Mundie, Director General, Corporate Secretariat, Canada Border Services Agency).

88 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 1015, (Monique McCulloch, Director, Access to Information and Privacy, Shared Services Canada).

89 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), March 2015.

90 Ibid.

## Recommendation 2.5

The Information Commissioner recommends that institutions' decision to refuse to process an access request be subject to appeal to the Information Commissioner.<sup>91</sup>

In her testimony to the Committee, the Information Commissioner also pointed out that she recommends that institutions be granted extensions to deal with multiple requests within a short period of time.<sup>92</sup>

Minister Brison asked the committee to look into whether the \$5 filing fee is the best way to filter vexatious and frivolous requests.<sup>93</sup> Mr. Wudrick was of the opinion that it “can prevent frivolous request-filing.”<sup>94</sup> Other witnesses questioned the deterrent effect of the fee. Cheryl Fisher, Corporate Secretary with the Corporate Secretariat of the Department of Employment and Social Development,<sup>95</sup> said that, given the increase in requests, she did not know how much of a deterrent the \$5 fee was. Mr. Mundie said it “probably has little to no impact in terms of volume of requests.”<sup>96</sup> Antoine Aylwin of the law firm Fasken Martineau pointed out that the fee might have the opposite effect, with people making huge requests so that they only have to pay the fee once.<sup>97</sup> Mr. Marleau said he did not see the fee having a deterrent effect and said you can deal with frivolous and vexatious requests by amending the legislation.<sup>98</sup>

Witnesses from provincial information and privacy offices described their approaches. Diane Poitras, Vice-President of the Commission d'accès à l'information du Québec, pointed out that Quebec does not use fees to address the issue, but relies on specific legislative provisions. She gave the following example: “When a public body, which has just 20 days to respond, receives an access request for several thousand

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91 Ibid.

92 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 25 February 2016, 1005 (Suzanne Legault, Information Commissioner of Canada).

93 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 5 May 2016, 0855 (Hon. Scott Brison, President of the Treasury Board).

94 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0855 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).

95 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0940 (Cheryl Fisher, Corporate Secretary, Corporate Secretariat, Department of Employment and Social Development).

96 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0940, (Robert Mundie, Director General, Corporate Secretariat, Canada Border Services Agency).

97 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0925 (Antoine Aylwin, Partner, as an individual).

98 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0940 (Robert Marleau, former Information Commissioner of Canada, as an individual).

documents, it can ask the commission for permission to disregard the request.”<sup>99</sup> Newfoundland and Labrador<sup>100</sup> and Alberta<sup>101</sup> have similar provisions. In Ontario, institutions may refuse frivolous or vexatious requests, but they must give reasons and the requester may appeal to the Information and Privacy Commissioner.<sup>102</sup>

Mr. Weiler<sup>103</sup> and Mr. Gogolek<sup>104</sup> expressed concerns that there is a risk in allowing government institutions to refuse to respond to such requests. In a brief submitted to the Committee, the B.C. Freedom of Information and Privacy Association described the concept of frivolous and vexatious requests as requests that “are designed to impede the functioning of the public body rather than to elicit information.”<sup>105</sup> Mr. Gogolek said he thought it is “very important that this be dealt with by the Commissioner.”<sup>106</sup>

The Committee was of the opinion that measures are needed to deal with frivolous and vexatious requests, and recommends:

## **RECOMMENDATION 12**

**That the government allow institutions to refuse to process requests that are frivolous, vexatious or an abuse of the right of access and that the institutions’ decisions to refuse to process such requests be subject to appeal to the Information Commissioner.**

## **3.4 FORMAT OF INFORMATION**

In Recommendation 2.7 of her report, the Information Commissioner recommended that, with certain limited exceptions, “institutions be required to provide information to

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99 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0955 (Diane Poitras, Vice-president, Commission d'accès à l'information du Québec).

100 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0925 (Sean Murray, Director of Special Projects, Office of the Information and Privacy Commissioner of Newfoundland and Labrador).

101 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 1000 (Jill Clayton, Information and Privacy Commissioner of Alberta).

102 [Freedom of Information and Privacy Act](#), R.S.O. 1990, c. F.31, s. 27.1(1).

103 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0940 (Mark Weiler, Web and User Experience Librarian, as an individual).

104 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0850 (Vincent Gogolek (Executive Director, B.C. Freedom of Information and Privacy Association).

105 B.C. Freedom of Information and Privacy Association, Brief, [“Reform of the Access to Information Act: Past time for Action,”](#) 12 May 2016, p. 12.

106 *Ibid.*, 0930.



requesters in an open, reusable, and accessible format by default.”<sup>107</sup> Mr. Wudrick identified this as a key recommendation.<sup>108</sup>

The Committee agrees and recommends:

### **RECOMMENDATION 13**

**That in the first phase of the reform of the *Access to Information Act*, institutions be required to provide information to requesters in an open, reusable and accessible format by default.**

### **3.5 FEES**

In her report, the Information Commissioner made the following recommendation:

Recommendation 2.8

The Information Commissioner recommends eliminating all fees related to access requests.<sup>109</sup>

As noted in Section 3.3 of our report, witnesses questioned whether the \$5 filing fee has any deterrent effect on frivolous or vexatious requests. Other witnesses pointed to the costs involved in processing the fee. Ms. McCullough said that a few years ago it was estimated to cost \$75 to process a \$5 cheque.<sup>110</sup> Mr. Gogolek said: “Even with electronic processing, where the cost is considerably reduced, if even 10% of requests come in with cash or cheques, the government is losing money. We urge you to save the taxpayers money and get rid of the \$5 fee.”<sup>111</sup>

Regarding provincial practices, Quebec does not charge a filing fee, but public bodies may charge for reproducing a document after the first 20 pages or so.<sup>112</sup> In Ontario, there is a nominal filing fee and institutions may charge a fee for responding to the

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107 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), March 2015.

108 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0900 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).

109 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), March 2015.

110 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0945, (Monique McCulloch, Director, Access to Information and Privacy, Shared Services Canada).

111 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0850 (Vincent Gogolek, Executive Director, B.C. Freedom of Information and Privacy Association).

112 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0945 (Diane Poitras, Vice-president, Commission d'accès à l'information du Québec).

request; at times it can be substantial.<sup>113</sup> In Alberta, there is a \$25 fee for access to general records and a fee schedule sets out maximum processing charges.<sup>114</sup> In Newfoundland and Labrador, there is no filing fee and search fees are not charged “until either 10 hours of search time or 15 hours of search time, depending on the category of public body you are.”<sup>115</sup>

The Committee was of the opinion that, given the seeming lack of a deterrent effect and the administrative costs, the \$5 filing fee should be abolished. On the other hand, it was also of the opinion that fees could be charged for voluminous requests or those that require extensive research, with the exception of requests for personal information. The Committee therefore recommends:

#### **RECOMMENDATION 14**

**That in the first phase of the reform of the *Access to Information Act*, the \$5 filing fee be abolished and that consideration be given to reinstating fees for voluminous requests and for requests that require lengthy research, with the exception of requests for personal information.**

In his testimony, Doug Letto, who was a member of Newfoundland and Labrador’s Independent Statutory Review Committee, said that the duty to assist means that institutions should work with requesters to clarify their requests when necessary, such as with respect to voluminous requests. He added that all access coordinators had received customer service training.<sup>116</sup> The federal government’s *Interim Directive on the Administration of the Access to Information Act* also requires institutions to, among other things, “Assist the requester in reformulating the request where it would result in the person receiving more accurate, complete and timely access.”<sup>117</sup> The Committee recommends:

#### **RECOMMENDATION 15**

**That consideration be given to strengthening the duty to assist through the implementation of client-service principles.**

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113 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0945 (Brian Beamish, Information and Privacy Commissioner of Ontario).

114 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0945 (Jill Clayton, Information and Privacy Commissioner of Alberta).

115 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0910 (Sean Murray, Director of Special Projects, Office of the Information and Privacy Commissioner of Newfoundland and Labrador).

116 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 31 May 2016, 0950 and 1020 (Doug Letto, Member, Independent Statutory Review Committee, as an individual).

117 Government of Canada, [Interim Directive on the Administration of the Access to Information Act](#), s. 7.4.3, 5 May 2016.

## CHAPTER 4: TIMELINES

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Chapter 3 of the Information Commissioner’s report addressed the timely access of information. Her recommendations included:

### Recommendation 3.1

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

### Recommendation 3.2

The Information Commissioner recommends that extensions longer than 60 days be available with the permission of the Information Commissioner where reasonable or justified in the circumstances and where the requested extension is calculated with sufficient rigour, logic and support to meet a reasonableness review.<sup>118</sup>

## 4.1 THE CULTURE OF DELAY

Several witnesses commented on what the Commissioner termed the “culture of delay.” For example, Mr. Drapeau noted “we daily receive letters back from departments authorizing themselves delays of 180 days or 200 days to respond.”<sup>119</sup> Mr. Wudrick said, “We have discovered that delays are the norm rather than the exception.”<sup>120</sup>

The Committee was interested to learn that in Sweden, “All questions concerning access to official documents must be dealt with expeditiously. ... In practice, that means immediately.”<sup>121</sup> The Committee also heard, however, that current processes would not allow Canadian institutions to respond to requests for information so quickly.<sup>122</sup> Some of

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118 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), March 2015.

119 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 1005 (Michel Drapeau, Professor, University of Ottawa, Faculty of Common Law, as an individual).

120 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0855 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).

121 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0900 (His Excellency Per Ola Sjogren, Ambassador of The Kingdom of Sweden to Canada, Embassy of Sweden).

122 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2016, 0940 (Jennifer Dawson, Deputy Chief Information Officer, Treasury Board Secretariat).

the reasons organizations ask for lengthy extensions are the complexity of the files and the volume of pages requested.<sup>123</sup>

## 4.2 EXTENSIONS

In her testimony, the Commissioner pointed out that the problem does not lie with the initial 30-day period, but with extensions for which there are no time limits.<sup>124</sup> She also recommended addressing delays as a priority by implementing other recommendations as well. Recommendations 3.3 to 3.10 dealt with extensions related to multiple requests, consulting other government institutions or affected parties, information being made available to the public and extension notices. The Committee did not hear enough testimony on these recommendations to be able to form an opinion at this time.

The Committee agreed with the idea of setting a time limit on extensions, but was of the opinion that 60 days is too long. The Committee therefore recommends:

### RECOMMENDATION 16

**That in the first phase of the reform of the *Access to Information Act*, extensions be limited to the extent strictly necessary, to a maximum of 30 days and that extensions longer than 30 days be available with the permission of the Information Commissioner.**

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123 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0950 (Marie-Claude Juneau, Director, Access to Information and Privacy, Canada Revenue Agency).

124 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 1005 (Suzanne Legault, Information Commissioner of Canada).

## CHAPTER 5: MAXIMIZING DISCLOSURE

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The Commissioner devoted Chapter 4 of her report to restrictions to the right of access to information by Canadian citizens, that is, the exemptions and exclusions provided for in the Act. In general, the Commissioner believes that the exemptions provided for in the Act should be more limited and specific.<sup>125</sup>

### 5.1 PUBLIC INTEREST OVERRIDE

In her report, the Commissioner says that, currently, “the Act contains only limited public interest overrides, and these are only applicable to a few sections.”<sup>126</sup> She said that a public interest override applicable to all exemptions should be added to the Act and made the following recommendation:

#### Recommendation 4.1

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

- Open Government objectives<sup>127</sup>;
- environmental, health or public safety implications; and
- whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person<sup>128</sup>.

In her report, the Commissioner noted that similar public interest provisions are found in many internationally recognized access to information laws and some provincial laws:<sup>129</sup>

The Article 19 and Organization of American States model laws, the Tshwane Principles, and the access laws of Serbia, India, Liberia, El Salvador, Sierra Leone, Ukraine, Alberta and B.C. all contain mandatory public interest overrides. Ontario’s law does as well;

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125 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), Special Report, March 2015, p.36.

126 Ibid., p.40.

127 In her report, the Commissioner explained what she meant by open government objectives: “whether the disclosure would support accountability of decision-makers, citizens’ engagement in public policy processes and decision-making, or openness in the expenditure of public funds.”

128 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), Special Report, March 2015, p.40.

129 Ibid.

however, it does not apply to all exemptions (...) Nova Scotia's law includes a discretionary, general public interest override<sup>130</sup>.

In her appearance before the Committee, the Commissioner said it was critical that this provision be added to the Act to strike the right balance between two interests: “the public’s right to know” and “the interests the exemption protects”<sup>131</sup> and reiterated the importance that this provision apply to all exemptions in the Act.<sup>132</sup>

The Commissioner also said that she had not defined “public interest” and that this concept is not defined in any other jurisdictions.<sup>133</sup> She also noted that the non-exhaustive list of factors to be considered could include the rights of indigenous peoples.<sup>134</sup> Lastly, she said that the list of factors to be considered in applying public interest override provisions should not be exhaustive and should be determined on a case-by-case basis.<sup>135</sup>

Several witnesses, including Mr. Mendel and Mr. Wudrick, expressed their support for the Commissioner’s recommendation to include a public interest override provision in the Act.<sup>136</sup> Mr. Mendel said that the exemptions in the Act should “protect legitimate interests,”<sup>137</sup> should “apply only where disclosure of the information will cause harm to the interest”<sup>138</sup> that is protected and, finally, a public interest override should apply. Mr. Murray also said that incorporating harms-based exemptions into the Act is beneficial because it prevents “the disclosure of certain information [that] could [...] lead to well-defined harms,” but does not exclude “entire classes of documents.”<sup>139</sup>

Lastly, Mr. Murray said that the Newfoundland and Labrador law has a “public interest override provision, which applies to most of our discretionary exceptions. The clerk

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130 Ibid, note 12.

131 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0855 (Suzanne Legault, Information Commissioner of Canada).

132 Ibid., 0955.

133 Ibid., 1005.

134 Ibid., 0855 and 1005.

135 Ibid., 1005.

136 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0850 (Toby Mendel, Executive Director, Centre for Law and Democracy); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0855 and 0915 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).

137 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0935 (Toby Mendel, Executive Director, Centre for Law and Democracy).

138 Ibid.

139 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 1040 (Sean Murray, Director of Special Projects, Office of the Information and Privacy Commissioner of Newfoundland and Labrador).

of the executive council can exercise a type of public interest override in relation to cabinet records as well.”<sup>140</sup>

Jennifer Stoddart, a former federal Privacy Commissioner who was a member of the Independent Statutory Review Committee in Newfoundland and Labrador, noted that the Review Committee broadened the public interest provision to include democratic factors and “to encourage transparency as to the acts of public servants.”<sup>141</sup>

The Committee believes that incorporating a public interest override provision would strike a balance between Canadians’ right of access and protecting legitimate interests and therefore recommends:

### **RECOMMENDATION 17**

**That in the first phase of the reform of the *Access to Information Act*, the Act be amended to include a general public interest override, applicable to all non-mandatory exemptions, with a requirement to consider the following, non-exhaustive list of factors:**

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

## **5.2 INDEPENDENT OVERSIGHT**

According to the Commissioner, it is important that the exemptions in the Act be independently reviewed. Her recommendation in this regard is as follows:

### Recommendation 4.2

The Information Commissioner recommends that all exclusions from the Act should be repealed and replaced with exemptions where necessary<sup>142</sup>.

In her appearance before the Committee, the Commissioner explained that, when dealing with an exclusion, she cannot review the requested information and, as a result, they are shielded from independent oversight. As to mandatory exemptions, the Commissioner explained that she would have access to the documents to which the

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140 Ibid., 0915.

141 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 31 May 2016, 0915 (Jennifer Stoddart, Member, Independent Statutory Review Committee, as an individual).

142 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), Special Report, March 2015, p.41.

exemption applied and that her independent oversight would be “limited to whether or not the documents (...) fit within the definition.”<sup>143</sup>

Many witnesses, including Mr. Marleau, Mr. Rubin, Mr. Weiler, Mr. Gogolek and Mr. Conacher<sup>144</sup> also believed that the exclusions in the Act should be repealed and replaced with exemptions. Mr. Wudrick and Mr. Holman said there were too many exemptions and exclusions in the Act and that they “create an expansive zone of secrecy surrounding the government’s decision-making processes.”<sup>145</sup> As well, many witnesses said that the exclusions prevent the Commissioner from reviewing documents when this review is needed.<sup>146</sup>

Lastly, it was mentioned that the confidentiality of documents subject to exemption can be appropriately assured by the Office of the Information Commissioner:

The Commissioner and everyone in the Commissioner’s office are under oath. There is no reason they can’t see any secret document, and there’s no worry about having those disclosed to anyone unless they should be disclosed under the law.<sup>147</sup>

The Committee supports the Commissioner’s recommendation and recommends:

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- 143 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 1010 (Suzanne Legault, Information Commissioner of Canada).
- 144 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0850 (Robert Marleau, former Information Commissioner of Canada, as an individual); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0850 and 0900 (Vincent Gogolek, Executive Director, B.C. Freedom of Information and Privacy Association); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 1020 (Ken Rubin, Public Interest Researcher, as an individual); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 1020 (Mark Weiler, Web and User Experience Librarian, as an individual); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0935 (Duff Conacher, Coordinator, Chairperson of Open Government Coalition, Democracy Watch).
- 145 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0950 (Sean Holman, Vice-President, Canadian Association of Journalists); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0855 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).
- 146 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0850 (Vincent Gogolek, Executive Director, B.C. Freedom of Information and Privacy Association); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0955 (Robert Marleau, former Information Commissioner of Canada, as an individual); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0935 (Duff Conacher, Coordinator, Chairperson of Open Government Coalition, Democracy Watch).
- 147 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0935 (Duff Conacher, Coordinator, Chairperson of Open Government Coalition, Democracy Watch).



## RECOMMENDATION 18

**That in the first phase of the reform of the *Access to Information Act*, all exclusions in the Act be repealed and replaced with exemptions, as required.**

### 5.3 EXEMPTIONS AND EXCLUSIONS

#### 5.3.1 Advice and recommendations

In her report, the Commissioner deals with the discretionary exemption provided for in section 21 of the Act on advice and recommendations. The Commissioner notes that this exemption “protects a wide range of information relating to policy- and decision-making”<sup>148</sup> but that the exemption in its current form “extends far beyond what must be withheld to protect the provision of free and open advice.”<sup>149</sup> The Commissioner believes that the breadth of this exemption must be narrowed to “strike the right balance between the protection of the effective development of policies, priorities and decisions on the one hand, and transparency in decision-making on the other.”<sup>150</sup> The Commissioner recommended the following:

##### Recommendation 4.21

The Information Commissioner recommends adding a reasonable expectation of injury test to the exemption for advice and recommendations.<sup>151</sup>

##### Recommendation 4.22

The Information Commissioner recommends explicitly removing factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for employees of a public institution from the scope of the exemption for advice and recommendations.<sup>152</sup>

##### Recommendation 4.23

The Information Commissioner recommends reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comes first.<sup>153</sup>

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148 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), Special Report, March 2015, p.56.

149 Ibid.

150 Ibid.

151 Ibid., p.55.

152 Ibid., p.56.

153 Ibid., p.55.

With regard to Recommendation 4.21, the Commissioner said that the criteria regarding the reasonable expectation of injury test would be applied on a case-by-case basis. For Recommendation 4.22, the Commissioner said that she made this recommendation to clarify that the exemption does not apply to the documents she specifically mentions.<sup>154</sup> Lastly, the Commissioner explained that the injury test mentioned above would also be subject to the time limit during which the exemption applies.<sup>155</sup>

Many witnesses, including Mr. Beamish, Mr. Conacher and Mr. Holman,<sup>156</sup> supported the Commissioner's recommendations. Mr. Beamish added that the Supreme Court of Canada recently interpreted the exemption for advice and recommendations in Ontario's access to information act very broadly.<sup>157</sup> The Commissioner said that Ontario's provision was very similar to that in the Act and "unless there is a legislative change for this provision it will not lead to more disclosure."<sup>158</sup> Lastly, in Newfoundland and Labrador, the legislation has "a long list of types of records that are not covered by that exception."<sup>159</sup>

The Committee generally agrees with the Commissioner's recommendations and recommends:

#### **RECOMMENDATION 19**

**That in the first phase of the reform of the *Access to Information Act*, a reasonable expectation of injury test be added to the exemption for advice and recommendations.**

#### **RECOMMENDATION 20**

**That factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for**

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154 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0910 (Suzanne Legault, Information Commissioner of Canada).

155 Ibid.

156 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0935 (Brian Beamish, Commissioner, Office of the Information and Privacy Commissioner of Ontario); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0905 (Duff Conacher, Coordinator, Chairperson of Open Government Coalition, Democracy Watch); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0850 (Sean Holman, Vice-President, Canadian Association of Journalists).

157 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0935 (Brian Beamish, Commissioner, Office of the Information and Privacy Commissioner of Ontario).

158 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0905 (Suzanne Legault, Information Commissioner of Canada).

159 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0915 (Sean Murray, Director of Special Projects, Office of the Information and Privacy Commissioner of Newfoundland and Labrador).

**employees of a public institution be explicitly removed from the scope of the exemption for advice and recommendations.**

## **RECOMMENDATION 21**

**That the time limit of the exemption for advice and recommendations be significantly reduced.**

### **5.3.2 Cabinet confidences**

Pursuant to section 69 of the Act, confidences of the Queen's Privy Council of Canada, that is, confidences of Cabinet or any of its committees, are excluded from the application of the Act. This section contains a non-exhaustive list of Cabinet confidences.

In her report, the Commissioner made the following recommendations:

#### Recommendation 4.26

The Information Commissioner recommends a mandatory exemption for Cabinet confidences when disclosure would reveal the substance of deliberations of Cabinet<sup>160</sup>.

#### Recommendation 4.27

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

- to purely factual or background information;
- to analyses of problems and policy options to Cabinet's consideration;
- to information in a record of a decision made by Cabinet or any of its committees on an appeal under an act;
- to information in a record that has been in existence for 15 or more years; and
- where consent is obtained to disclose the information.<sup>161</sup>

#### Recommendation 4.28

The Information Commissioner recommends that investigations of refusals to disclose pursuant to the exemption for Cabinet confidences be delegated to a limited number of designated officers or employees within her office.<sup>162</sup>

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160 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), Special Report, March 2015, p.62.

161 Ibid.

162 Ibid., p.63.

First, in her appearance, the Commissioner said that, currently, given that the Act provides an exclusion for Cabinet confidences, there is no oversight.<sup>163</sup> There is therefore no way of knowing whether the exclusion was properly applied.<sup>164</sup> Like her predecessors over the past 30 years, the Commissioner recommended in her report that Cabinet confidences be subject to a mandatory exemption.<sup>165</sup> The Commissioner would therefore have the ability to conduct an independent oversight of Cabinet confidences: she could review these records and “be able to review whether it is actually a cabinet confidence that’s being claimed.”<sup>166</sup> Given the sensitivity of those records, the Commissioner explained that their review would be similar to the review of national security records, which her Office already does. A limited number of investigators would be authorized to do this work.<sup>167</sup>

Second, the Commissioner believes that the scope of the definition of what is a Cabinet confidence is much too broad and needs to be limited.<sup>168</sup> Recommendation 4.27 therefore aims to limit what constitutes Cabinet deliberations.<sup>169,170</sup>

Mr. Marleau, said it was essential that “a considerable share of cabinet documents, especially those involving discussions between ministers, must remain confidential in our system, which is based on the Westminster model.”<sup>171</sup> However, he said that the mandatory exemption recommended by the Commissioner does not mean that all Cabinet confidences would be disclosed, but that the Commissioner would have oversight with these documents and that she would be a third party determining whether the exemption was properly applied.<sup>172</sup> Ms. Clayton made similar comments.<sup>173</sup>

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163 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0855 (Suzanne Legault, Information Commissioner of Canada).

164 Ibid., 0920.

165 Ibid.

166 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 25 February 2016, 0935 (Suzanne Legault, Information Commissioner of Canada).

167 Ibid.

168 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0920 (Suzanne Legault, Information Commissioner of Canada).

169 Ibid., 0930.

170 Ibid., 0910.

171 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0945 (Robert Marleau, former Information Commissioner of Canada, as an individual).

172 Ibid.

173 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0940 (Jill Clayton, Commissioner, Office of the Information and Privacy Commissioner of Alberta).

Lastly, it was mentioned that in Quebec, Ontario and Alberta, Cabinet confidences are subject to an exemption and, in their testimony, the commissioners of these provinces stated they believed this exemption was appropriate.<sup>174</sup>

The Committee believes that Cabinet confidences, when their disclosure would reveal the substance of deliberations of Cabinet, should be subject to a mandatory exemption rather than an exclusion. The Committee therefore recommends:

#### **RECOMMENDATION 22**

**That a mandatory exemption for Cabinet confidences, when disclosure would reveal the substance of deliberations of Cabinet, be added to the *Access to Information Act* in the first phase of the reform of the Act.**

#### **RECOMMENDATION 23**

**That the mandatory exemption for Cabinet confidences would not apply to:**

- **purely factual or background information;**
- **information in a record of decision made by Cabinet or any of its committees on an appeal under an act;**
- **where consent is obtained to disclose the information; and**
- **information in a record that has been in existence for an appropriate period of time as determined by the government and that this period of time be less than the current 20 years.**

#### **RECOMMENDATION 24**

**That investigations of refusals to disclose pursuant to the exemption for Cabinet confidences be delegated to a limited number of designated officers or employees within the Information Commissioner's office.**

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174 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0925 (Brian Beamish, Commissioner, Office of the Information and Privacy Commissioner of Ontario); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0930 (Jill Clayton, Commissioner, Office of the Information and Privacy Commissioner of Alberta); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0925 (Diane Poitras, Vice-President, Commission d'accès à l'information du Québec).

### **5.3.3 The Commissioner's other recommendations**

Chapter 4 of the Commissioner's report contains many recommendations regarding the exemptions and exclusions in the Act. The Committee heard comments from some witnesses about many of these exemptions and exclusions. However, the Committee does not believe it heard enough testimony to be able to take a position on the recommendations of the Commissioner or witnesses.

## CHAPTER 6: STRENGTHENING OVERSIGHT

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In her report, the Information Commissioner recommended changing the oversight provisions from the current ombudsperson model to an order-making model. She made the following recommendations:

### Recommendation 5.1

The Information Commissioner recommends strengthening oversight of the right of access by adopting an order-making model.<sup>175</sup>

### Recommendation 5.2

The Information Commissioner recommends providing the Information Commissioner with the discretion to adjudicate appeals.<sup>176</sup>

### Recommendation 5.3

The Information Commissioner recommends that the Act provide for the explicit authority to resolve appeals by mediation.<sup>177</sup>

### Recommendation 5.4

The Information Commissioner recommends that any order of the Information Commissioner can be certified as an order of the Federal Court.<sup>178</sup>

In her testimony to the Committee, the Information Commissioner identified this as a priority and said that adopting an order-making model would:

ensure that the processing of requests would be more timely, would instill more discipline and more predictability, would provide an incentive for institutions to make comprehensive and complete representations to the commissioner at the outset, would create a body of precedents that increases over time, and requesters and institutions would then have a clear direction as to the commissioner's position on institutions' obligations and requesters' rights under the Act.<sup>179</sup>

The Information Commissioner also said an order-making model would need to be complemented by additional powers, such as the ability to audit compliance, to initiate

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175 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), March 2015.

176 Ibid.

177 Ibid.

178 Ibid.

179 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 25 February 2016, 0855 (Suzanne Legault, Information Commissioner of Canada).

investigations, to carry out education activities, to conduct and fund research and to provide advice on legislation, programs and activities.<sup>180</sup> She also said that if the order-making power were adopted, a period of time would need to be provided to put it into place.<sup>181</sup>

The Information Commissioner drew several distinctions between the ombudsperson model and the order-making model. She said that, in cases related to administrative matters, ordering an institution to disclose information is more efficient than conducting an investigation. In addition, she said that under the order-making model, the mediation process is more effective. As well, institutions must give all their justifications for non-disclosure at the outset.<sup>182</sup> Under the current model, court proceedings are *de novo* proceedings, where everything is back on the table.<sup>183</sup>

In 2015, Newfoundland and Labrador instituted a unique hybrid model, under which the commissioner operates as an ombudsman. If a public body objects to one of the commissioner's recommendations, however, it must go to court to request permission not to follow it.<sup>184</sup>

Asked about the differences between this hybrid model and the order-making model, the Information Commissioner said the requests at the federal level are much more numerous and complex. As well, appeals to court under the hybrid model remain *de novo* proceedings, which the order-making model would avoid. The Information Commissioner also said that in complex cases where there are thousands of pages and multiple recommendations for disclosure, the hybrid model might lead to more cases going to court.<sup>185</sup>

Mr. Wells pointed out that, under the order-making model, there could be a conflict between the Commissioner's roles as an advocate and as an arbiter. He said there is no such conflict under the hybrid model.<sup>186</sup>

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180 Ibid.

181 Ibid., 0850.

182 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 25 February 2016, 0950 (Suzanne Legault, Information Commissioner of Canada).

183 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0900 (Suzanne Legault, Information Commissioner of Canada).

184 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0910 (Sean Murray, Director of Special Projects, Office of the Information and Privacy Commissioner of Newfoundland and Labrador).

185 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0930 (Suzanne Legault, Information Commissioner of Canada).

186 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 31 May 2016, 1045 (Clyde Wells, Member, Independent Statutory Review Committee, as an individual).



Witnesses from the information and privacy offices of Quebec, Ontario and Alberta spoke about the benefits of their order-making models. Brian Beamish, the Information and Privacy Commissioner of Ontario, said that it “promotes an expeditious, cost-effective, efficient access to information regime that has a real element of finality to it.”<sup>187</sup> He also said the model creates a body of jurisprudence, which provides guidance when dealing with future requests.<sup>188</sup> Ms. Clayton, Information and Privacy Commissioner of Alberta, said that the order-making model enhances consistency and is less adversarial than going to court.<sup>189</sup>

The adoption of an order-making model was supported by Mr. Mendel,<sup>190</sup> Mr. Holman,<sup>191</sup> Mr. Wudrick,<sup>192</sup> Mr. Rubin,<sup>193</sup> Marc-André Boucher of Fasken Martineau,<sup>194</sup> Mr. Marleau<sup>195</sup> and the Assembly of First Nations.<sup>196</sup>

The Committee also heard concerns regarding the order-making model, however. In a letter to the Committee, the Privacy Commissioner of Canada, Daniel Therrien, pointed out that the *Access to Information Act* and the *Privacy Act* were passed as twin statutes and recommended that the interplay between the two Acts be carefully examined. He said that “the delicate balance between access and privacy that was struck by Parliament when the two Acts were adopted” would be upset by “granting the Information Commissioner the power to order disclosure of what is claimed to be personal information.” He suggested, “this should not be done until the full implications can be

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187 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0855 (Brian Beamish, Information and Privacy Commissioner of Ontario).

188 Ibid., 0900.

189 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0915 (Jill Clayton, Information and Privacy Commissioner of Alberta).

190 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0940 (Toby Mendel, Executive Director, Centre for Law and Democracy).

191 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0850 (Sean Holman, Vice-President, Canadian Association of Journalists).

192 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0855 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).

193 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0900 (Ken Rubin, Public Interest Researcher, as an individual).

194 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0935 (Marc-André Boucher (Lawyer, as an individual)).

195 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0850 (Robert Marleau, former Information Commissioner of Canada, as an individual).

196 Assembly of First Nations, “[AFN Submission to the Standing Committee on Access to Information, Privacy and Ethics](#),” 30 May 2016, p. 3.

thought through in the legislative review that will take place in 2018.”<sup>197</sup> Asked about his position, the Information Commissioner said it would be unworkable, with an order-making power for some exemptions, but not for others. She also said that the Information Commissioner has been interpreting the exemption for personal information for over 30 years.<sup>198</sup>

In addition, Mr. Gogolek raised concerns about the possibility that the order-making model might be accompanied by a ministerial override or veto, which he said would be “a bad idea.”<sup>199</sup> Mr. Marleau concurred, saying that such an override would place ministers in an awkward situation and undermine the independence of the government officials to whom authority is delegated.<sup>200</sup> As noted in Section 2.3 of our Report, Mr. Marleau also raised concerns about how order-making powers would apply to Parliament.<sup>201</sup>

The Assembly of First Nations also opposed the idea of a ministerial veto saying it “could potentially place Canadian Ministers in a conflict of interest due to the Crown’s fiduciary obligation to act in the best interest of First Nations.”<sup>202</sup> Mr. Wells said that the broad ability of ministers to veto the release of documents would lower public confidence in the system,<sup>203</sup> but said he could see a need in very limited circumstances, such as where national security or national defence issues are involved.<sup>204</sup>

The Information Commissioner also said she was not in favour of a ministerial override or veto. She pointed out that in the United Kingdom, the information commissioner’s decisions may be reviewed by the courts and the ministerial override could be imposed after the commissioner’s order or after the court’s order. She noted that the U.K. Supreme Court recently decided that the ministerial veto was unconstitutional because a minister reviewed a decision of the court and that it was not appropriate for the executive to override a judicial decision. She went on to say that if the government were to

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197 Office of the Privacy Commissioner of Canada, “[Letter to the House of Commons Standing Committee on Access to Information, Privacy and Ethics \(ETHI\)](#),” 18 May 2016.

198 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0955 (Suzanne Legault, Information Commissioner of Canada).

199 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0850 (Vincent Gogolek (Executive Director, B.C. Freedom of Information and Privacy Association)

200 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0845 (Robert Marleau, former Information Commissioner of Canada, as an individual)

201 Ibid., 1000.

202 Assembly of First Nations, “[AFN Submission to the Standing Committee on Access to Information, Privacy and Ethics](#),” 30 May 2016, p. 3.

203 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 31 May 2016, 0930 (Clyde Wells, Member, Independent Statutory Review Committee, as an individual).

204 Ibid., 0925.

adopt a ministerial override, the entire independent oversight model should be abandoned.<sup>205</sup>

In the U.K., the Independent Commission on Freedom of Information reviewing the *Freedom of Information Act 2000* published its report in March 2016. In it, the Commission said that Parliament intended the executive to have a veto. It said the executive, which is responsible for national security, defence and international relations, “is in a unique position to assess the wider public interest”<sup>206</sup> and recommended that, “the government should legislate to put beyond doubt that it has the power to exercise a veto over the release of information under the Act.”<sup>207</sup> The Commission also recommended that the veto power “be clarified so that it is to be exercised where the executive takes a different view of the public interest in disclosure.”<sup>208</sup> The Commission also said that the veto is most appropriate at the Information Commissioner (IC) stage and not after an appeal to the tribunals or courts. The Commission recommended that the veto be “available only to overturn a decision of the IC where the accountable person (i.e. the head of the institution) takes a different view of the public interest in disclosure.”<sup>209</sup> The veto would be subject to judicial review by the High Court.<sup>210</sup> In its response, the government said:

The Commission recommends the introduction of a narrower and more limited veto provision. The government agrees with the Commission’s analysis that Parliament intended the executive to be able to have the final say as to whether information should be released under the Act. In line with the Commission’s thinking, the government will in future only deploy the veto after an Information Commissioner decision. On the basis that this approach proves effective, we will not bring forward legislation at this stage.<sup>211</sup>

## **RECOMMENDATION 25**

**That the government strengthen the oversight of the right of access by adopting an order-making model with clear and rigorously defined parameters.**

Regarding the idea of a ministerial veto, the Committee heard testimony that raised concerns about it. It therefore recommends:

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205 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0920 (Suzanne Legault, Information Commissioner of Canada).

206 United Kingdom, Independent Commission on Freedom of Information, [Report](#), March 2016, p. 37.

207 Ibid.

208 Ibid., p. 38.

209 Ibid., p. 40.

210 Ibid.

211 United Kingdom, Cabinet Office, [“Matt Hancock laid a written statement in Parliament on the Independent Commission on Freedom of Information's final report,”](#) 1 March 2016.

## **RECOMMENDATION 26**

**That if an order-making model is adopted, any ministerial veto be limited to national security issues, be exercised only to overturn an order of the Information Commissioner and be subject to judicial review.**

## CHAPTER 7: OPEN INFORMATION

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In his appearance before the Committee, Minister Brison said that a change in culture around access to information was needed in order to “move toward a culture of ‘open by default.’”<sup>212</sup> He also said that the government has made commitments in terms of “an open and transparent government and trusting people, trusting Parliament, and trusting citizens to help us inform the decisions we take as a government.”<sup>213</sup>

### 7.1 THE COMMISSIONER’S RECOMMENDATIONS

In her report, the Commissioner addressed open information: “The Act should be amended to reflect the government’s open government initiatives, including additional requirements for proactive disclosure.”<sup>214</sup> The Commissioner believes that the proactive disclosure of information that is of public interest will:

- serve to provide more information to the public so that they may effectively evaluate the government’s response to issues of public interest;
- allow the public to pressure the government to take remedial action to prevent harm; and
- reduce the impact of events of public interest on the access system by decreasing the number of access requests that the public makes to an institution.<sup>215</sup>

The Commissioner therefore recommended the following:

#### Recommendation 6.1

The Information Commissioner recommends that institutions be required to proactively publish information that is clearly of public interest.<sup>216</sup>

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212 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 5 May 2016, 0850 (Hon. Scott Brison, President of the Treasury Board).

213 Ibid., 1015.

214 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), Special Report, March 2015, p.81.

215 Ibid., p.82.

216 Ibid., p.80.

#### Recommendation 6.2

The Information Commissioner recommends requiring institutions to adopt publication schemes in line with the *Directive on Open Government*.<sup>217</sup>

#### Recommendation 6.3

The Information Commissioner recommends including within publication schemes a requirement that institutions proactively publish information about all grants, loans or contributions given by government, including the status of repayment and compliance with the terms of the agreement.<sup>218</sup>

#### Recommendation 6.4

The Information Commissioner recommends including within publication schemes a requirement that institutions post the responsive records of completed access to information requests within 30 days after the end of each month, if information is or is likely to be frequently requested.<sup>219</sup>

#### Recommendation 6.5

The Information Commissioner recommends a discretionary exemption that would allow institutions to refuse to disclose information that is reasonably available to the requester. The exemption should continue to allow an institution to withhold information placed in Library and Archives Canada or listed museums by third parties.<sup>220</sup>

## 7.2 WITNESSES' POINTS OF VIEW

Many witnesses said that a culture of openness by default and proactive disclosure were welcome.

First, as to a culture of openness by default, the Ambassador of the Kingdom of Sweden to Canada, His Excellency Per Ola Sjogren, told the Committee that Sweden has a strong culture of openness and that their openness is “a basis for handling cases when it comes to public documents.” This therefore “diminishes the workload when it comes to appeals and other cumbersome administrative procedures.”<sup>221</sup>

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217 Ibid., p.81.

218 Ibid., p.82.

219 Ibid.

220 Ibid., p.83.

221 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0955 (His Excellency Per Ola Sjogren, Ambassador of The Kingdom of Sweden to Canada, Embassy of Sweden).

Second, as to proactive disclosure, in Quebec, “the access to documents act and accompanying regulations provide for the proactive disclosure of some information and documents by government departments and agencies.”<sup>222</sup>

Moreover, the Committee was told that access to information requests vary between departments and that their respective realities can differ. Some departments said that they were currently reviewing the most appropriate way for their department to publish information proactively.<sup>223</sup>

However, many departments said that, while proactive disclosure was a good initiative, it did not necessarily reduce departments’ workloads given that they must still determine whether the exemptions and exclusions in the Act applied before publishing a document.<sup>224</sup>

Mr. Wudrick, Mr. Conacher and Mr. Holman supported the Commissioner’s recommendation that all information of public interest be published proactively and emphasized the importance that the information be available in a readable format.<sup>225</sup>

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222 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 0845 (Diane Poitras, Vice-President, Commission d’accès à l’information du Québec).

223 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 22 March 2016, 0900 (Stefanie Beck, Assistant Deputy Minister, Corporate Services, Department of Immigration, Refugees and Citizenship); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 22 March 2016, 0945 (Larry Surtees, Corporate Secretary, Department of National Defence); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 10 May 2016, 0920 (Jennifer Dawson, Deputy Chief Information Officer, Treasury Board Secretariat).

224 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 22 March 2016, 0945 (Larry Surtees, Corporate Secretary, Department of National Defence); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0900 (Marie-Josée Thivierge, Assistant Deputy Minister and Chief Financial Officer, Office of the Assistant Deputy Minister and Chief Financial Officer, Department of Justice); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 1005 (Monique McCulloch, Director, Access to Information and Privacy, Shared Services Canada).

225 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0855 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0850 (Sean Holman, Vice-President, Canadian Association of Journalists); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0905 (Duff Conacher, Coordinator, Chairperson of Open Government Coalition, Democracy Watch).

Mr. Rubin recommended the creation of a proactive disclosure code that would create a legal obligation making certain data available and set up operative principles on transparency and the right to access to information.<sup>226</sup>

For his part, Mr. Weiler opposed the addition of provisions on proactive disclosure in the Act<sup>227</sup> and recommended “creating a new, separate law dedicated to publishing government information or data.”<sup>228</sup> Mr. Weiler believed this new law “could be rooted in the principle that governments have a responsibility to publish information that Canadians need to be informed citizens” and “should have oversight to ensure the government is publishing information when it has a duty to do so.”<sup>229</sup> Lastly, Mr. Weiler recommended expanding paragraph 5(1)(b) of the Act to “include the mandatory publishing of record retention schedules.”<sup>230</sup>

### 7.3 THE COMMITTEE’S RECOMMENDATION

The Committee believes that government transparency, a culture of openness by default and the proactive disclosure of information of public interest must be fundamental values of the Government of Canada. The Committee firmly believes that a change in culture to a culture of openness and proactive disclosure are effective ways to reduce the administrative duties of handling access to information requests and reducing the costs of Canada’s access to information system. The Committee therefore recommends:

#### RECOMMENDATION 27

**That in the first phase of the reform of the *Access to Information Act*, institutions be required to proactively publish information that is clearly of public interest.**

#### RECOMMENDATION 28

**That institutions be required to adopt publication schemes in line with the *Directive on Open Government*.**

#### RECOMMENDATION 29

**That the format in which information is published proactively be in an open, reusable and accessible format by default.**

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226 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0900 (Ken Rubin, Public Interest Researcher, as an individual); Brief by Ken Rubin, [ReMaking and RePlacing the Antiquated Limited Broken Access to Information Act](#).

227 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0910 (Mark Weiler, Web and User Experience Librarian, as an individual).

228 Ibid.

229 Ibid., 0940.

230 Ibid., 1005.



### **RECOMMENDATION 30**

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



## CHAPTER 8: MANDATORY PERIODIC REVIEW OF THE ACT

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In her report, the Commissioner notes that, since its enactment 30 years ago, the Act “has not been comprehensively updated”<sup>231</sup> and “has fallen behind modern standards.” The Commissioner told the Committee that the Act must include a mandatory periodic review.<sup>232</sup> The Commissioner made the following recommendation in her report:

### Recommendation 8.1

The Information Commissioner recommends a mandatory parliamentary review of the Act every five years, with a report tabled in Parliament.<sup>233</sup>

In his appearance, Minister Brison said that a five-year mandatory review would be implemented.<sup>234</sup>

Some witnesses, including Mr. Murray, Mr. Weiler and Mr. Gogolek, supported the Commissioner’s recommendation.<sup>235</sup>

The Committee also believes that a five-year review of the Act is needed to make sure it is up to date, that it responds to technological needs and that Canadians can easily access information from the Government of Canada. The Committee recommends:

### RECOMMENDATION 31

**That a mandatory parliamentary review of the Act be done every five years and that an obligation to table a report in Parliament be included in the *Access to Information Act* in the first phase of the reform of the Act.**

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231 Ibid., p.94.

232 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 May 2016, 0900 (Suzanne Legault, Information Commissioner of Canada).

233 Office of the Information Commissioner of Canada, [Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act](#), Special Report, March 2015, p.92.

234 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 5 May 2016, 0850 (Hon. Scott Brison, President of the Treasury Board).

235 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 0850 (Vincent Gogolek, Executive Director, B.C. Freedom of Information and Privacy Association); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 0915 (Sean Murray, Director of Special Projects, Office of the Information and Privacy Commissioner of Newfoundland and Labrador); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 21 April 2016, 0945 (Mark Weiler, Web and User Experience Librarian, as an individual).



## CHAPTER 9: ACCESS TO INFORMATION AND PRIVACY COORDINATORS

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During the Committee's hearings, there was some discussion about access to information and privacy (ATIP) coordinators. To ensure their accountability, Mr. Drapeau suggested that they be appointed by the Governor in Council.<sup>236</sup> However, this idea, which would make ATIP coordinators political appointees, was opposed by other witnesses, including Mr. Holman,<sup>237</sup> Mr. Wudrick,<sup>238</sup> Mr. Gogolek<sup>239</sup> and Mr. Marleau.<sup>240</sup>

Minister Brison said that ATIP coordinators are independent and their decisions "ought not be influenced by ministers or ministers' offices."<sup>241</sup> The Committee also heard from government officials. Ms. McCulloch explained that as Director of Access to Information and Privacy, she has the delegated authority and the discretion to make the day-to-day decisions.<sup>242</sup> Ms. Juneau,<sup>243</sup> Francine Farley of Justice Canada<sup>244</sup> and Dan

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- 236 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0850 (Michel Drapeau, Professor, University of Ottawa, Faculty of Common Law, as an individual).
- 237 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 1000 (Sean Holman, Vice-President, Canadian Association of Journalists).
- 238 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 1000 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).
- 239 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 May 2016, 1005 (Vincent Gogolek, Executive Director, B.C. Freedom of Information and Privacy Association).
- 240 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0930 (Robert Marleau, former Information Commissioner of Canada, as an individual).
- 241 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 5 May 2016, 0900 (Hon. Scott Brison, President of the Treasury Board).
- 242 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0930 (Monique McCulloch, Director, Access to Information and Privacy, Shared Services Canada).
- 243 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0930 (Marie-Claude Juneau, Director, Access to Information and Privacy, Canada Revenue Agency).
- 244 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0930 (Francine Farley, Director, ATIP Operations, Information Solution Branch, Justice Canada).

Proulx of the Canada Border Service Agency<sup>245</sup> also said they have the necessary independence.

Ms. Stoddart noted that the Independent Statutory Review Committee in Newfoundland and Labrador polled ATIP coordinators anonymously to find out how autonomous they felt they were and what the problems were from their point of view.<sup>246</sup>

The Committee is of the opinion that the role of ATIP coordinators within government institutions requires further study in order to ensure their independence and autonomy. It therefore recommends:

### **RECOMMENDATION 32**

**That as part of its review of the *Access to Information Act*, the Government conduct a study of the role that Access to Information Coordinators play within government institutions in order to ensure that they have the necessary independence and autonomy.**

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245 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 17 May 2016, 0930 (Dan Proulx, Director, Access to Information and Privacy Division, Canada Border Service Agency).

246 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 31 May 2016, 1020 (Jennifer Stoddart, Member, Independent Statutory Review Committee, as an individual).

## CHAPTER 10: THE OFFICE OF THE INFORMATION COMMISSIONER

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The Committee heard some discussion about the idea of merging the Office of the Information Commission and the Office of the Privacy Commissioner. The access to information and privacy commissioners from Quebec, Alberta and Ontario said that having combined offices was useful when it comes to personal information.<sup>247, 248, 249</sup> Mr. Beamish pointed out that “when there’s a need to balance the right to privacy with a public interest or need for transparency and openness,” this can be done effectively.<sup>250</sup>

Mr. Drapeau said the two offices should have a common administrative service.<sup>251</sup>

On the other hand, Edward Ring, Information and Privacy Commissioner of Newfoundland and Labrador, said that, in his view, “the size and magnitude of the work involved in the federal bureaucracy requires two offices.”<sup>252</sup> He was supported by Mr. Wudrick<sup>253</sup> and Mr. Holman.<sup>254</sup>

Ms. Stoddart noted that the two offices perform different functions. She said that while the Office of the Information Commissioner tends to be concerned with access to government information, the Office of the Privacy Commissioner has a role in providing advice to the government on privacy issues involving technology, developments in the

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247 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 1010 (Diane Poitras, Vice-president, Commission d'accès à l'information du Québec).

248 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 1010 (Jill Clayton, Information and Privacy Commissioner of Alberta).

249 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 8 March 2016, 1010 (Brian Beamish, Information and Privacy Commissioner of Ontario).

250 Ibid.

251 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 12 April 2016, 0845 (Michel Drapeau, Professor, University of Ottawa, Faculty of Common Law, as an individual).

252 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 1005 (Edward Ring, Information and Privacy Commissioner of Newfoundland and Labrador).

253 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 1005 (Aaron Wudrick, Federal Director, Canadian Taxpayers Federation).

254 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 19 April 2016, 1005 (Sean Holman, Vice-President, Canadian Association of Journalists).

private sector and privacy issues related to national security. She also said that the two offices usually settle their differences out of court.<sup>255</sup>

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255 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Evidence](#), 1st Session, 42nd Parliament, 31 May 2016, 1035 (Jennifer Stoddart, Member, Independent Statutory Review Committee, as an individual).



# LIST OF RECOMMENDATIONS

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## RECOMMENDATION 1

That in the first phase of the reform of the *Access to Information Act*, the Act be amended in order to identify the institutions subject to the Act according to criteria, which shall include the following:

- institutions that are publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);
- institutions that perform a public function, including those that meet one of the following criteria:
  1. The institution performs a public function for the federal government in one of its areas of jurisdiction, such as health and safety, the environment and economic security;
  2. The institution has the power to establish regulations or standards in an area of federal jurisdiction;
  3. The institution is responsible for carrying out a public policy on behalf of the federal government;
- institutions established by statute (such as airport authorities);
- all institutions covered by the *Financial Administration Act*..... 9

## RECOMMENDATION 2

That in the second phase of the reform of the *Access to Information Act*, further consideration be given as to how the Act should apply to institutions that are publicly funded by the Government of Canada..... 10

## RECOMMENDATION 3

That in the first phase of the reform of the *Access to Information Act*, the Act be extended to include the Prime Minister's Office, offices of ministers and ministers of State, and parliamentary secretaries, except in regards to their parliamentary functions. .... 11

## RECOMMENDATION 4

That in the first phase of the reform of the *Access to Information Act*, the scope of the Act be extended to include organizations that support Parliament, such as the Board of Internal Economy, the Library of Parliament, the Conflict of Interest and Ethics Commissioner and the Senate Ethics Officer. .... 14

**RECOMMENDATION 5**

- A. That a new provision be created in the Act in order to prevent any infringement of parliamentary privilege.
- B. That the Government of Canada consult the organizations that support Parliament, specifically, the Clerk of the Senate, the Clerk of the House of Commons and the Parliamentary Librarian, in order to determine the content of the new provision protecting parliamentary privilege and to ensure that this new provision effectively protects parliamentary privilege. .... 14

**RECOMMENDATION 6**

That a separate and specific part of the Act be created pertaining to the application of the Act to organizations that support Parliament..... 14

**RECOMMENDATION 7**

That the Government of Canada consult the organizations that support Parliament, specifically, the Clerk of the House of Commons, to determine the extent to which the Act should apply to the Board of Internal Economy. .... 14

**RECOMMENDATION 8**

That Parliament determine the appropriate process for the independent review of the application of the provisions protecting parliamentary privilege..... 14

**RECOMMENDATION 9**

That in the first phase of the reform of the *Access to Information Act*, the application of the Act be extended to include bodies providing administrative support to the courts, such as the Registrar of the Supreme Court of Canada, the Courts Administration Service, the Office of the Commissioner for Federal Judicial Affairs Canada and the Canadian Judicial Council, except in regards to court files, the records and personal notes of judges, as well as communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity. .... 15

**RECOMMENDATION 10**

That in the first phase of the reform of the *Access to Information Act*, the Act be amended to establish a comprehensive legal duty to document, with appropriate sanctions for non-compliance. .... 18

**RECOMMENDATION 11**

That extending the right of access to all persons be considered in the second phase of the reform of the *Access to Information Act*. .... 20

**RECOMMENDATION 12**

**That the government allow institutions to refuse to process requests that are frivolous, vexatious or an abuse of the right of access and that the institutions' decisions to refuse to process such requests be subject to appeal to the Information Commissioner..... 22**

**RECOMMENDATION 13**

**That in the first phase of the reform of the *Access to Information Act*, institutions be required to provide information to requesters in an open, reusable and accessible format by default. .... 23**

**RECOMMENDATION 14**

**That in the first phase of the reform of the *Access to Information Act*, the \$5 filing fee be abolished and that consideration be given to reinstating fees for voluminous requests and for requests that require lengthy research, with the exception of requests for personal information. .... 24**

**RECOMMENDATION 15**

**That consideration be given to strengthening the duty to assist through the implementation of client-service principles..... 24**

**RECOMMENDATION 16**

**That in the first phase of the reform of the *Access to Information Act*, extensions be limited to the extent strictly necessary, to a maximum of 30 days and that extensions longer than 30 days be available with the permission of the Information Commissioner..... 26**

**RECOMMENDATION 17**

**That in the first phase of the reform of the *Access to Information Act*, the Act be amended to include a general public interest override, applicable to all non-mandatory exemptions, with a requirement to consider the following, non-exhaustive list of factors:**

- Open Government objectives;**
- environmental, health or public safety implications;**
- whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person. .... 29**

**RECOMMENDATION 18**

**That in the first phase of the reform of the *Access to Information Act*, all exclusions in the Act be repealed and replaced with exemptions, as required..... 31**

**RECOMMENDATION 19**

**That in the first phase of the reform of the *Access to Information Act*, a reasonable expectation of injury test be added to the exemption for advice and recommendations..... 32**

**RECOMMENDATION 20**

**That factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for employees of a public institution be explicitly removed from the scope of the exemption for advice and recommendations. .... 32**

**RECOMMENDATION 21**

**That the time limit of the exemption for advice and recommendations be significantly reduced. .... 33**

**RECOMMENDATION 22**

**That a mandatory exemption for Cabinet confidences, when disclosure would reveal the substance of deliberations of Cabinet, be added to the *Access to Information Act* in the first phase of the reform of the Act..... 35**

**RECOMMENDATION 23**

**That the mandatory exemption for Cabinet confidences would not apply to:**

- **purely factual or background information;**
- **information in a record of decision made by Cabinet or any of its committees on an appeal under an act;**
- **where consent is obtained to disclose the information; and**
- **information in a record that has been in existence for an appropriate period of time as determined by the government and that this period of time be less than the current 20 years. .... 35**

**RECOMMENDATION 24**

**That investigations of refusals to disclose pursuant to the exemption for Cabinet confidences be delegated to a limited number of designated officers or employees within the Information Commissioner’s office..... 35**

**Recommendation 25**

**That the government strengthen the oversight of the right of access by adopting an order-making model with clear and rigorously defined parameters..... 41**

**RECOMMENDATION 26**

**That if an order-making model is adopted, any ministerial veto be limited to national security issues, be exercised only to overturn an order of the Information Commissioner and be subject to judicial review..... 42**

**RECOMMENDATION 27**

**That in the first phase of the reform of the *Access to Information Act*, institutions be required to proactively publish information that is clearly of public interest..... 46**

**RECOMMENDATION 28**

**That institutions be required to adopt publication schemes in line with the *Directive on Open Government*..... 46**

**RECOMMENDATION 29**

**That the format in which information is published proactively be in an open, reusable and accessible format by default. .... 46**

**RECOMMENDATION 30**

**That a requirement that institutions post the responsive records of completed access to information requests within 30 days after the end of each month, if information is or is likely to be frequently requested, be included within publication schemes. .... 47**

**RECOMMENDATION 31**

**That a mandatory parliamentary review of the Act be done every five years and that an obligation to table a report in Parliament be included in the *Access to Information Act* in the first phase of the reform of the Act..... 49**

**RECOMMENDATION 32**

**That as part of its review of the *Access to Information Act*, the Government conduct a study of the role that Access to Information Coordinators play within government institutions in order to ensure that they have the necessary independence and autonomy..... 52**



# APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<p><b>Office of the Information Commissioner of Canada</b></p> <p>Nancy Bélanger, General Counsel Director of Legal Services</p> <p>Suzanne Legault, Information Commissioner of Canada</p> <p>Jacqueline Strandberg, Counsel Legal Services</p>	2016/02/25	3
<p><b>Commission d'accès à l'information du Québec</b></p> <p>Jean-Sébastien Desmeules, Secretary General and Chief of Legal Services</p> <p>Diane Poitras, Vice-president</p>	2016/03/08	4
<p><b>Office of the Information and Privacy Commissioner of Alberta</b></p> <p>Sharon Ashmore, General Counsel</p> <p>Jill Clayton, Commissioner</p> <p>Kim Kreutzer Work, Director, Knowledge Management</p>		
<p><b>Office of the Information and Privacy Commissioner of Ontario</b></p> <p>Brian Beamish, Commissioner</p>		
<p><b>Department of Citizenship and Immigration</b></p> <p>Stefanie Beck, Assistant Deputy Minister Corporate Services</p> <p>Michael Olsen, Director General Corporate Services Sector</p>	2016/03/22	6
<p><b>Department of National Defence</b></p> <p>Kimberly Empey, Director Directorate Access to Information and Privacy</p> <p>Larry Surtees, Corporate Secretary</p>		
<p><b>As an individual</b></p> <p>Michel W. Drapeau, Professor University of Ottawa, Faculty of Common Law</p>	2016/04/12	7
<p><b>Centre for Law and Democracy</b></p> <p>Toby Mendel, Executive Director</p>		
<p><b>Embassy of Sweden</b></p> <p>Per Ola Sjogren, Ambassador of The Kingdom of Sweden to Canada</p>		

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Canadian Association of Journalists</b> Sean Holman, Vice-President	2016/04/19	9
<b>Canadian Taxpayers Federation</b> Aaron Wudrick, Federal Director		
<b>Office of the Information and Privacy Commissioner of Newfoundland and Labrador</b> Sean Murray, Director of Special Projects Edward Ring, Information and Privacy Commissioner		
<b>As an individual</b> Antoine Aylwin, Partner Marc-André Boucher, Lawyer Ken Rubin, Public Interest Researcher Mark Weiler, Web and User Experience Librarian	2016/04/21	10
<b>Treasury Board Secretariat</b> Scott Brison, President of the Treasury Board Jennifer Dawson, Deputy Chief Information Officer	2016/05/05	12
<b>Public Services and Procurement Canada</b> Simon Fradette, Director General of Specialized Services Sarah Paquet, Assistant Deputy Minister	2016/05/10	13
<b>Treasury Board Secretariat</b> Jennifer Dawson, Deputy Chief Information Officer		
<b>As an individual</b> Ezra Levant, President TheRebel.media	2016/05/12	14
<b>B.C. Freedom of Information and Privacy Association</b> Vincent Gogolek, Executive Director		
<b>Democracy Watch</b> Duff Conacher, Coordinator Chairperson of Open Government Coalition		
<b>As an individual</b> Robert Marleau, Former Information Commissioner of Canada	2016/05/17	15
<b>Canada Border Services Agency</b> Robert Mundie, Director General Corporate Secretariat Dan Proulx, Director Access to Information and Privacy Division		



<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Canada Revenue Agency</b> Marie-Claude Juneau, Director Access to Information and Privacy	2016/05/17	15
<b>Department of Employment and Social Development</b> Cheryl Fisher, Corporate Secretary Corporate Secretariat		
<b>Department of Justice</b> Francine Farley, Director, ATIP Operations Management and CFO Sector Marie-Josée Thivierge, Assistant Deputy Minister and Chief Financial Officer Office of the Assistant Deputy Minister and Chief Financial Officer		
<b>Shared Services Canada</b> Monique McCulloch, Director Access to Information and Privacy		
<b>Office of the Information Commissioner of Canada</b> Suzanne Legault, Information Commissioner of Canada	2016/05/19	16
<b>Independent Statutory Review Committee</b> Doug Letto, Member Jennifer Stoddart, Member Clyde Wells, Member	2016/05/31	17



# **APPENDIX B LIST OF BRIEFS**

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## **Organizations and Individuals**

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**Assembly of First Nations**

**B.C. Freedom of Information and Privacy Association**

**Canadian Association of Journalists**

**Drapeau, Michel**

**Elections Canada**

**Office of the Information Commissioner of Canada**

**Office of the Privacy Commissioner of Canada**

**Rubin, Ken**



# REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant Minutes of Proceedings ([Meetings Nos. 3, 4, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21](#)) is tabled.

Respectfully submitted,

Blaine Calkins  
Chair

