Government of Canada | Gouvernement du Canada

Strengthening the *Access to Information Act*

A Discussion of Ideas Intrinsic to the Reform of the *Access to Information Act*

April 11, 2006

Canada

Introduction

Consistent with its commitment to introduce reforms to improve the accountability of the federal public sector and the federal access regime at the earliest opportunity, the Government is introducing a proposed *Federal Accountability Act* on April 11, 2006, which includes a number of reforms to the *Access to Information Act* (*ATIA*). One will extend the coverage of the *ATIA* to parent Crown Corporations, Agents of Parliament, and three foundations created by federal statute. Additional exemptions have been introduced to ensure adequate and clear protection of sensitive information of the new entities to be covered. As well, certain administrative reforms have been proposed.

As stated on several occasions, the Government is committed to consulting with citizens on ongoing policy development processes and to ensuring that Members of Parliament have the benefit of input from all Canadians. A number of the proposed access reform elements, including the coverage of other entities, Cabinet confidences, duty to document, and the exemptions scheme, are extremely complex and require further analysis, discussion and debate. The *ATIA* has a broad constituency across many sectors of society with widely divergent views on its administration. For this reason, it is appropriate to hear a range of views on reform proposals and to develop approaches for reform in a public forum, before the Government prepares its bill.

To set the stage for this public discussion, the Government is tabling a set of legislative proposals based on the Information Commissioner's recommendations for the reform of the *ATIA*, which were regarded favourably by the Standing House Committee on Access to Information, Privacy and Ethics in the last Parliament. The Government is also tabling this discussion paper, which offers comments on some of the Information Commissioner's proposals and some alternate approaches to reform for consideration. It is hoped that the legislative proposals and discussion paper will be studied by the Standing House Committee on Access to Information, Privacy and Ethics. In this regard, the Government has noted that the Information Commissioner and Deputy Information Commissioner advised the Committee, when these proposals were first tabled in 2005, that no consultations had been undertaken on their recommended reforms. Also, while the substance of the proposals was endorsed by the Committee and the House in the last Parliament, it must be noted that the views of affected stakeholders had not been provided to the Committee. Moreover, any government bill resulting from the above process should comply with federal drafting standards and conventions and must be the product of a bilingual and bijural drafting process. Finally, the cost implications of the Information Commissioner's proposals have not yet been fully assessed and, in this regard, a preliminary estimate of the potential magnitude of costs is attached as Annex 1 to this paper.

In summary, the Government was in a position to introduce some reforms as part of the proposed *Federal Accountability Act*, as sufficient consultations have been undertaken with the affected entities to allow the development of reforms. The remaining proposals, however, require further consultation, analysis and development before additional

reforms can be drafted and introduced. The Government, through the Committee, needs to hear a broad range of views on the possible impacts on core operations of government and on persons who deal with government, before proceeding.

Given the complexity of the *ATIA* and of the Information Commissioner's proposals, the paper identifies key issues for further analysis and public discussion, and suggests alternate approaches, where appropriate.

1. Coverage of the Access to Information Act

What institutions **should** be covered by the *Access to Information Act*? Answering that question requires an understanding of the reasons why an institution should be covered, the reasons why an institution should not be covered, and whether there are other, more effective alternative mechanisms for achieving the objective pursued by coverage. To date, there has been inconsistency in the types of institutions which have been included on the Schedule of the Act.

The Information Commissioner's proposals under consideration are that:

> All departments and ministries of state of the Government of Canada; all bodies or offices funded in whole or in part from Parliamentary appropriations; all bodies or offices wholly- or majority-owned by the Government of Canada; all bodies or offices listed in Schedule I, I.1, II and III of the Financial Administration Act; and all bodies or offices performing functions or providing services in an area of federal jurisdiction that are essential to the public interest as it relates to health, safety or protection of the environment…
>
> [But not] the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada, or any component part of these institutions; or the offices of members of the Senate or the House of Commons.

The Committee is asked to consider the parameters for determining the institutions to be covered by the *ATIA*.

Considerations:

Why include an institution?

A determination of which institutions should be covered by the *ATIA* is generally guided by the perceived objective of the *ATIA*. If the principal purpose of the *ATIA* is perceived as being to foster public participation in public policy decisions by allowing access to 'unfiltered' information, then the focus of coverage would be those institutions which develop and apply public policy. If the purpose of the *ATIA* is perceived to be accountability for actions, then the focus of coverage would be those institutions which are considered to be operational. If the purpose of the *ATIA* is perceived to be accountability for spending money, then the focus would be financial. The broadest approach is to include all institutions considered to be part of, or controlled by, the federal government unless there is a reason not to do so.

Why not include an institution?

It is not as easy as it would at first appear to determine a comprehensive and exhaustive list of federal government institutions. Over the last few years a wide range of institutions have been established with shared governance or with mixed sources of funding. In circumstances where the federal government does not appoint a majority of directors, or does not supply a significant portion of the funding, it may be difficult to argue that the federal *Access to Information Act* should be applied to that institution.

In cases where entities under provincial jurisdiction receive federal funding, the federal government does not have constitutional jurisdiction to impose the *Access to Information Act* on those entities. In such instances, an alternative mechanism for ensuring that federal funds are properly spent may be sufficient. This may be achieved through a provision in a funding agreement specifying the information requirements attached to the funding (as is often already the case) or the requirement for acceptance of a regime of proactive disclosure.

For very small institutions it may be that the relatively small amount of information which is needed from the institutions in order to keep them accountable does not justify the cost or the potential administrative burden of processing requests. In such cases alternate mechanisms may also be appropriate.

Some institutions may hold only two types of information: information that would not be disclosed due to its sensitivity or the presumption of harm from its disclosure, and information about the administration of the institution. In those cases, the Government may wish to focus coverage of the *ATIA* on the information about the administration of the institution. This approach was used with respect to Atomic Energy of Canada Limited in the proposed *Federal Accountability Act*. This can be done by adding the institution to Schedule I of the *ATIA* and then by excluding all of the information held by the institution which is not related to the administration of the institution. The same objective might also be reached by stating clearly in Schedule I that the *ATIA* applies only to the information related to the administration of the institution. Although this method has not been used so far in Canada, it is a method used in some other jurisdictions.

Once a determination is made as to which institutions, or parts of institutions, should be covered by the *ATIA*, another determination has to be made for each of those institutions whether the existing protections are sufficient and, if not, what new or additional protections would be required. This is why the additional exemptions for the newly added Crown corporations and Agents of Parliament have been introduced in the proposed *Federal Accountability Act*.

By adding the Agents of Parliament, parent federal Crown corporations and three foundations to the *ATIA* via the *Federal Accountability Act*, the government has broadened the coverage of the *ATIA*. The government is now seeking the advice of the

Committee on where to draw the line and why. In another part of the paper you will be asked to consider how/if the *ATIA* should apply to Parliament itself.

Almost all analysts in this area have used some measures of control and funding as the two basic criteria* then added other means of capturing additional institutions; usually related to the function of the organizations. Similar criteria may be established to determine those institutions that should not be covered by the *ATIA*. For example, the necessity of avoiding interference with the independence of the judiciary results in a tendency not to cover the courts, although in some jurisdictions their administrative information is covered.

At the same time that consideration is given to including more institutions under the *ATIA*, there needs to be consideration of any unique characteristics of those institutions and the information they hold. For example, over the years there have been numerous recommendations that the Canadian Broadcasting Corporation be brought under the *ATIA*, and every recommendation has included a reference to the need to protect information relating to journalistic sources. For every institution added, there is a need to consider whether the current exemption scheme is sufficient or whether additional exemptions or exclusions may be necessary. It is virtually impossible to make such a determination without consulting the institutions themselves, since they know what information they hold and what kind of protection it requires. For that reason the Committee is encouraged to consult the institutions they would like the government to consider covering under the *Access to Information Act*.

A noticeable situation in the case of the Office of the Information Commissioner being added to the coverage of the *ATIA* (or the Office of the Privacy Commissioner being added to the coverage of the *Privacy Act*), is the need for an alternative mechanism to handle complaints. Since it is unlikely that there would be a high volume of complaints filed against the Office of the Information Commissioner, the complaint resolution would

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* In 1987 the Parliamentary Committee studying the Act proposed to use two basic criteria, then added a list of others: It recommended two criteria for defining government institutions:

- exclusively financed out of the Consolidated Revenue Fund; or, for agencies not exclusively financed in this way, but who can raise funds through public borrowing,
- degree of government control.

The committee also recommended that the *Act* cover all administrative tribunals, the Senate, the House of Commons (but excluding the offices of Senators and Members of the House of Commons), the Library of Parliament, and Parliamentary officers; all wholly-owned Crown corporations and their wholly-owned subsidiaries; and where the Government of Canada controls a public institution by power of appointment over the majority of its board. With respect to the Canadian Broadcasting Corporation, the committee recommended that it be subject to the *Act*, with a specific exemption for program material. The committee did not recommend inclusion of the judiciary.

probably not be a full-time function, so the mechanism would have to allow for being dormant for long periods while providing the flexibility to be activated reasonably quickly. The means for making a complaint would have to be perpetually available, and the person or body acting on the complaint would need to have the same authority and obligations as the Information Commissioner has for all other investigations. In some jurisdictions (notably British Columbia and Alberta), a retired judge of the superior court is appointed for this purpose and is activated only as needed. The Government would appreciate the Committee's suggestions on the appropriate design of this alternative oversight mechanism, the appointment process and the qualifications of the selected individual.

An often overlooked factor that any responsible government must also consider when examining the issue of expanding coverage is the probable cost. It goes without saying that the greater the number of institutions covered by the *Access to Information Act*, the higher the cost. For smaller institutions the cost of processing each request made under the *ATIA* is a proportionately larger share of their budget. For institutions that deal largely in sensitive information, the cost of processing may also be disproportionate to the amount of information which may be disclosed. These are all factors to consider.

A final point is that institutions which are made subject to the *Access to Information Act* are also made subject to its companion legislation, the *Privacy Act*, and that institutions which are subject to either the *Access to Information Act* or the *Privacy Act* are automatically covered by the *Library and Archives of Canada Act*. While in principle the increase in accountability, privacy protection and protection of archival heritage is positive, it has implications for the administration of the institutions, and for the federal government. Making otherwise independent institutions subject to these three pieces of legislation could result in an increase in the federal government's apparent or actual control of the institutions and a fundamental change in their status. Decisions on the governance of institutions and their role in relation to the government must be made in consideration of all relevant factors, not as an unintended consequence of one initiative.

2. Offices of Ministers, Members of Parliament, the House of Commons, the Senate and the Library of Parliament

Previous Prime Ministers have consistently taken the position that the *ATIA* does not apply to records held within Ministers' offices. The *ATIA* was interpreted to treat a Minister's office as being separate and distinct from the government institution or department for which the Minister is responsible. Ms. Inger Hansen, the first Information Commissioner, agreed with this approach in her 1989 annual report, where she stated that the House of Commons and Ministers' offices are not subject to the *ATIA*. Mr. John Reid, the current Information Commissioner, however, does not agree with his predecessor and has taken the position that some records in a Minister's office are subject to the *ATIA*. He has proposed, in his explanatory notes that accompany his reform recommendations, that "records held in ministers' offices, relating to departmental matters, will be subject to the reject [sic] of access; the personal and political records of ministers will not".

Considerations:

One option is to adopt the Information Commissioner's proposal to extend coverage of the *ATIA* to records held in Ministers' departmental offices with the exception of personal and political records of Ministers. One concern with this option is that the Information Commissioner would have access to review the personal and political records of Ministers to determine whether the *ATIA* would apply.

Another option to promote openness, transparency and accountability is to amend the *ATIA* to extend its coverage to records held in the offices of all Members of the House of Commons, as well as Ministers' departmental offices, with an exclusion for personal and political records. The Information Commissioner would thus have access to departmental records held in Ministers' offices, but would not have the right to review all records to determine *ATIA* application. Individual Members and Ministers would certify their personal and political records and these would be excluded from the application of the *ATIA*.

It is also possible to extend coverage of the *ATIA* to all Members' offices, but not to Ministers' departmental offices, with an exclusion for personal and political records. The amendment could be drafted to ensure that all records sent to Ministers' departmental offices by the government institution would be required to be maintained under the control of the government institution for the purposes of the *ATIA*. At the same time, those records sent by the Minister or his or her staff to a government institution would be required under the *ATIA* to be maintained in the government institution, so that records relating to the operations of the government institution would be under the control of the government institution. Placing this new requirement in the *ATIA* would meet the underlying purpose of the Information Commissioner's proposal, that is, to give him access to all departmental records.

Full and frank public political debate is essential to a properly functioning political system. At the same time, political parties must be able to discuss and formulate their political views and positions in private. It is possible that providing access to all records in the offices of Members would reduce this full and frank debate. Political parties and political considerations play vital roles in our system of responsible government. Confidentiality is necessary to ensure that this process functions effectively and fairly. The option to exclude personal and political records, therefore, respects the distinction between partisan political records and those records found in government institutions which are departmental, non-political and non-partisan.

Members dedicate much of their time and efforts to their constituents' concerns and issues. In the course of this work, they may receive records containing personal information about their constituents and other Canadians. Members may also keep their own personal records in their offices. Under the proposed amendment, these personal records would be excluded from the ambit of the *ATIA*, so there would be no review by either the Information Commissioner or the courts of the decisions made by Members to apply exclusions.

Examples of records that may be found in Members' offices could include: letters to Ministers addressing particular issues of concern in their constituency, opinions or research documents, records relating to Members' activities in the House of Commons, speaking notes on particular topics (e.g., for public events), schedules, and documents in relation to Members' expenses. Whether these documents would be covered by the *ATIA* would be a case by case determination. This may require an access to information coordinator to review the records to determine whether they are personal or political. If the records located are personal or political, they would be excluded from the *ATIA*.

Extending the *ATIA* to cover all Members of the House of Commons would ensure that there are not two classes of Members, that is, those who are covered by the *ATIA* and those who are not. Excluding political records from the *ATIA* would ensure that all political parties operate on a level playing field in this regard, because the same rules would apply to everyone and everyone would be equally accountable. The *ATIA* would apply to all relevant records held by Members, apart from the excluded personal and political records.

Another issue that may be addressed by the Committee is whether to extend coverage of the *ATIA* to the House of Commons, the Senate and the Library of Parliament, in terms of their administration. If the coverage is expanded to include the House of Commons, the Senate and the Library of Parliament, there should also be protection for records protected by parliamentary privilege, political parties' records, as well as personal and political records. However, records in respect of the financial administration of these institutions would be accessible under the *ATIA*.

3. Cabinet Confidences

In Canada, responsible ministerial government is based on the individual and collective responsibility of the members of Cabinet to Parliament. Cabinet is the political forum in which Ministers meet to establish a consensus on the government's general directions and on broad governmental policies that each Minister must individually and publicly defend.

Cabinet confidences are therefore, in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.

The requirement to protect the confidentiality of Cabinet proceedings is a cornerstone of the Westminster system of government and is protected by convention, common law and legislative provisions. Furthermore, this principle has been widely recognized by the courts. In its 2002 *Babcock* decision, the Supreme Court of Canada stated that an important reason for protecting Cabinet documents was to avoid the creation of ill-informed public or political criticism. The Court further stated that:

> [i]f Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect…

> The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.[1]

The essence of the principle of Cabinet confidentiality is therefore to protect the collective decision-making of Ministers whereby Ministers discuss issues and arrive at decisions.

In his recommendations presented to the Committee last fall, the Information Commissioner proposed to create a mandatory exemption for Cabinet confidences. Heads of government institutions would decide what information in their institutions would fall within the definition of a Cabinet confidence, with a right of review of that information and of those decisions by the Information Commissioner and the courts.

Considerations:

It is possible that the review of sensitive Cabinet confidence information by the Information Commissioner and the courts would expose and undermine the collective decision-making of Ministers and would run contrary to the principles of collective decision-making by Ministers and their accountability for those decisions to Parliament. Collective responsibility is the principle which underlies the solidarity of the Ministry. Disclosure of this information outside the accountability framework to Parliament could lead to the weakening of the ability of the Ministry to function collectively and for Ministers to be held accountable to Parliament. It is for this reason that it may be wise to maintain the exclusion for Cabinet confidences, which is consistent with the current Government's commitment that it would subject the exclusion of Cabinet confidences to review by the Information Commissioner.

Under the current law, the Information Commissioner has no legislative right to review the decisions of the Clerk of the Privy Council as to what information constitutes a Cabinet confidence. An informal practice exists, however, by which the Information Commissioner investigates the decisions to withhold Cabinet confidences from disclosure. To this end, an option would be to legislate a certification and review process in the *Access to Information Act* that would closely parallel the *Canada Evidence Act*, whereby the certification of Cabinet confidences can only be challenged where the information for which the privilege was claimed does not on its face fall within the statutory definition of Cabinet confidences, or where it could be shown that the Clerk had improperly exercised the discretion conferred. This regime was upheld in 2002, by the Supreme Court of Canada in *Babcock*, and more recently in 2005 by the Federal Court of Appeal in the *Vennat* and *Pelletier* decisions.[2]

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

[2] *Canada (Privy Council) v. Pelletier*, 2005 FCA 118.

A statutory amendment could be enacted to grant the Information Commissioner a limited right of review of the issuance of certificates by the Clerk of the Privy Council, therefore ensuring the Information Commissioner's review of the Cabinet confidence exclusion.

4. Exemptions Scheme

4.1. Structure of the Current Exemptions Scheme

As stated in Section 2, the purpose of the *Access to Information Act* is

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

This right of access to records under the control of a government institution is set out in section 4 and the limitations to that right are set out in sections 13 through 24 and 26. The hurdle for supporting an exemption in the course of a Court challenge has been high. A table of exemptions from the Access to Information Review Task Force Report of June, 2002, has been attached as Annex 2 to this paper. The table shows for each exemption whether it is class-based or subject to an injury test, and whether its application is mandatory or discretionary.

a. Class vs. Injury or Harm-Based Exemptions

Exemptions currently fall into two types. Class-based exemptions apply where the information falls within the class of information described in the exemption and there is no reference to any consequence that might result from the release of the information. Injury-based exemptions require that an injury be demonstrated before the exemption can be claimed.

Class-based exemptions presuppose that the information is inherently sensitive and that an injury or prejudice would automatically flow from release. Examples include: section 13, which protects information obtained in confidence from other governments; subsection 16(3), which deals with information obtained or prepared by the Royal Canadian Mounted Police while acting as a municipal or provincial police force; subsection 19(1), which protects personal information; and paragraphs 20(1)(a) and (b), which protect the trade secrets and the confidential financial, commercial, scientific or technical information of third parties. In each of these cases, the information belongs, or is viewed as belonging, to a third party - another government, an individual or a commercial entity. It is not federal government information *per se*.

Class exemptions also apply in cases where the information has already been classified or identified, through some other mechanism, as requiring protection from disclosure.

Examples of exempting provisions which recognize a pre-existing basis for protection are section 23, solicitor and client privilege and section 24, where the need for confidentiality has been identified in some other statutory provision.

The third set of class exemptions focuses on the type of information and the context in which it is generated and is based on the view that release of the information would automatically be contrary to the public interest and that protection from disclosure is therefore necessary. These exemptions are: paragraph 16 (1)(a), information obtained or prepared by specified investigative bodies in the course of lawful investigations - provided the information is less than twenty years old; paragraph 16(1)(b), information relating to investigative techniques or plans for specific lawful investigations; subsection 18(1), government trade secrets or financial, commercial, scientific or technical information that has, or is likely to have, substantial value; and subsection 21(1), advice or recommendations to the government, consultations involving government officials, positions, plans or considerations for government negotiations and plans regarding personnel management or government administration.

Injury exemptions, on the other hand, are based on a determination by the head of the institution that it is reasonable to expect that some injury, harm or prejudice will occur to the government, or to a third party commercial entity, if the information is released. Injury-based exemptions are found in: section 14, injury to federal provincial affairs; section 15, injury to international affairs and defence; paragraph 16(1)(c), injury to the enforcement of any law of Canada or a province or the conduct of lawful investigations; subsection 16(2), information which could reasonably be expected to facilitate the commission of an offence; section 17, safety of individuals; paragraphs 18(b), (c) and (d), injury or prejudice to the economic interests of Canada; paragraphs 20(1)(c) and (d), injury to third party interests; and section 22, prejudice to testing procedures, tests and audits.

b. Mandatory vs. Discretionary Exemptions

The basis upon which the exemptions are applied by the head of a government institution also varies. In some cases, it is mandatory that the exemption be applied. In other cases, the head of the government institution has discretion as to whether or not to apply the exemption.

A mandatory exemption is one where the head of a government institution has no, or a more limited, discretion regarding whether or not to protect the sensitive information. That is, if the information is covered by the exemption and the conditions for the exercise of the discretion do not exist, then it must not be disclosed. Mandatory exemptions can be contrasted with discretionary exemptions, where the head of the government institution must turn his mind actively to the question of whether or not the sensitive information should be protected, or should be released, and then make a decision. A mandatory exemption offers a higher level of protection by allowing a government institution to assure the entities that are providing the sensitive information, sometimes under a statutory obligation, that it will not be released to a requester if it is covered by the exemption.

Four exemptions are currently mandatory: information received in confidence from another government (section 13), information obtained or prepared by the RCMP about provincial or municipal policing services (subsection 16(3)), personal information (section 19), and information about a third party's financial and commercial interests (subsection 20(1)). In addition, section 24 establishes a range of mandatory exemptions to ensure the confidentiality of specific classes of information in accordance with other federal statutes as listed in Schedule II (discussed in section 4.3 c of this paper)). Three of those exemptions contain a qualified discretion to disclose and only one exemption is purely mandatory: information obtained or prepared by the RCMP about provincial or municipal policing services (subsection 16(3)).

c. Public Interest Override

Currently the Act does not contain a general public interest override which would require that information be disclosed in all cases where the general public interest in disclosure outweighs the specific public interest or other (third party) interest which is intended to be protected by the exempting provision. Rather, the public interest in disclosure is addressed on a case-by-case basis and only in connection with two exemptions in the *ATIA*. These are limited to situations where the information is that of a third party.

First, paragraph 19(2)(c) incorporates the provisions of section 8 of the *Privacy Act* which includes, in subparagraph 8(2)(m)(i), a discretionary provision for the release of personal information in circumstances where the head of the institution forms the opinion that "the public interest in disclosure of the personal information in issue **clearly** outweighs the invasion of privacy."

Second, subsection 20(6) provides for the disclosure of third party information, other than a trade secret, "if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure **clearly** outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party."

4.2. Review of Information Commissioner's Proposals for Exemptions

The Information Commissioner proposes three broad, significant changes to the current exemptions scheme: transforming most mandatory exemptions into discretionary ones, adding more injury tests, and adding a broad public interest override test to all exemptions. Since the release of the Commissioner's proposals last autumn, concerns have been raised about the potential impact on relationships between government and its stakeholders, on government's core operations and on third party stakeholders themselves. In particular, concerns have been raised about the combined effect of the shift to injury-based exemptions, the repeal of the s. 24 mandatory exemptions and a general public interest override. This section reviews the key changes to each exemption recommended by the Information Commissioner and highlights the potential impacts.

a. Section 13—Information Obtained in Confidence from Other Governments

Section 13 is a mandatory exemption that requires the head of a government institution to

refuse to disclose a record containing information obtained in confidence from the government of a foreign state, an international organization of states, the government of a province, a regional or municipal government, or an institution of that government or organization. Subsection 13(2) permits disclosure of information if the government, institution or organization from which it was obtained makes the information public, or if it consents to disclosure.

The Information Commissioner first proposes to change this exemption from mandatory to discretionary. He would require the government institution to disclose the information under subsection 13(2) if the government from which it was obtained makes the information public or consents to disclosure.

Finally, the Information Commissioner proposes to add an injury test to section 13. Specifically, he proposes to add that "[d]isclosure of the information would be injurious to relations with the government, institution or organization."

Considerations:

The government receives confidential information from other governments, both domestic (such as provincial and municipal) and foreign. Freedom of information statutes of other Commonwealth countries consistently recognize that the relationship which allows for the candid exchange of information must be fostered. They also recognize that there will be circumstances where the information that is received from third party governments is, in fact, the proprietary information of that third party government. It is generally thought to be to the advantage of the Canadian government to be able to offer these other governments a firm commitment that the information they provide in confidence to the Canadian government will be protected from disclosure. Put differently, there is real concern that other governments might be considerably less willing to provide the Canadian government with information in confidence if the Canadian government were obliged to say that the sensitive information would be protected from an access requester only at the discretion of the head of the government institution.

Converting section 13 to a discretionary, injury-based exemption would set Canada apart from its key partners and would likely have a negative effect on other governments' willingness to share information with Canada. Accordingly, it is suggested that the Committee carefully consider the broad implications of this proposal and, in so doing, that it consult with the federal departments that would be most affected by the change proposed by the Information Commissioner and, in particular, government institutions that deal with international relations, defence, national security, law enforcement and public safety.

b. Section 16—Law Enforcement and Investigations

Section 16 provides for exemptions related to law enforcement and investigations. Subsection 16(1) is a discretionary exemption that permits the head of a government institution to refuse to disclose:

(a) for up to 20 years, information obtained or prepared by a federal investigative body specified in the Regulations, in the course of lawful investigations pertaining to the detection, prevention or suppression of crime, the enforcement of any law of Canada or a province, or activities suspected of constituting threats to the security of Canada;

(b) information relating to investigative techniques or plans for specific lawful investigations;

(c) information the disclosure of which could reasonably be expected to harm the enforcement of any law of Canada or a province or the conduct of lawful investigations; or

(d) information the disclosure of which could reasonably be expected to harm the security of penal institutions.

The Information Commissioner proposes to repeal paragraphs 16(1)(a) and (b). He states that sensitive law enforcement and investigative information would be adequately protected by paragraph 16(1)(c). As such, information related to law enforcement and lawful investigations could only be protected under section 16 if the disclosure of that information "could reasonably be expected to be injurious to the enforcement of any law of Canada or a province."

Considerations:

By deleting paragraphs 16(1)(a) and (b), which are discretionary class exemptions, s. 16 would contain only discretionary injury-based exemptions. This means that the head of the government institution would not be able to protect information unless the head is able to demonstrate, on reasonable and probable grounds, that injury would result from the release of the information. This is a much heavier burden than if the injury is left unexpressed and implicit, as in the current section 16. Concerns may be raised by the security community, such as the Canadian Security Intelligence Service, that the risk of disclosure under a reformed s. 16 would impair the ongoing relationships between Canadian government institutions and their counterparts in other governments.

It should be noted that some other jurisdictions protect this type of information through a discretionary injury test, such as the demonstration of some kind of prejudice, to protect policing information.

The Committee may, however, wish to consider, in the light of increased pressures to protect national security and public safety, whether it is desirable to place a heavier

burden of proof on the heads of government institutions in relation to this type of information.

c. Section 18—Economic Interests of Canada

Section 18 provides discretionary protection for information relating to the "economic interests of Canada." The exemption protects:

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada and has (or is likely to have) substantial value;

(b) information, which if disclosed, could reasonably be expected to prejudice the competitive position of a government institution;

(c) scientific or technical information obtained through research, which could if disclosed, realistically be expected to deprive an officer or employee of priority of publication; or

(d) information the disclosure of which could reasonably be expected to materially injure the financial interests of the Government of Canada, or the government's ability to manage the economy.

The Information Commissioner proposes to amend paragraph 18(a) by deleting references to financial, commercial, scientific or technical information. The Commissioner considers that this information is already captured in paragraph 18(d), which is a discretionary injury-based test. The proposed amendment would reduce the scope of the class exemption in paragraph 18(a).

Considerations:

Requiring a government institution (which will include parent Crown corporations and foundations) to rely solely on the injury test in paragraph 18(d) may not ensure adequate protection for the Government's financial, commercial, scientific or technical information. For example, if the National Research Council made a scientific discovery that had a potential value of two million dollars, this would currently be protected under the existing paragraph 18(a). However, if the Information Commissioner's proposal is adopted and paragraph 18(a) is repealed, it might not be possible to protect that information using paragraph 18(d). That is, the release of information leading to the potential loss of two million dollars might not meet the test of being "materially injurious to the financial interests of the Government of Canada."

The Committee may wish to hear the views of government institutions, such as the Departments of Finance, Industry, National Defence and Public Works and Government Services, that are engaged in activities that could be affected negatively by such amendments.

a. Section 20 – Third Party Information

Subsection 20(1) is a mandatory exemption for :

(a) trade secrets of a third party;

(b) confidential commercial, financial, scientific or technical information that is supplied to the government by a third party and is consistently treated in a confidential manner by the third party;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

The Information Commissioner recommends the repeal of paragraph 20(1)(b), as he considers the current paragraph 20(1)(c) to be adequate to ensure that any legitimate business need for secrecy is served. The Commissioner also recommends that a government institution be required to disclose information contained in a bid or contract with a government institution.

Considerations:

Since the *ATIA* can be used by an organization to obtain information about its competitors, paragraph 20(1)(b) is claimed frequently by third parties to protect their sensitive information which is under the control of government institutions. The Federal Court has developed a test to limit how paragraph 20(1)(b) is applied. To be applicable, the information must meet the following test:

1) The records must be financial, commercial, scientific or technical information;

2) The information must be "confidential" by some objective standard;

3) The information must be supplied to a government institution by a third party (observations about a third party by a government official do not constitute information which is supplied to the government; likewise negotiated terms of a contract are not normally seen as information supplied to the government);

4) The information must have been treated consistently in a confidential manner by the third party.

In many areas, the Government of Canada depends on the willingness of third parties to voluntarily provide it with confidential, commercial information. If paragraph 20(1)(b)

were repealed, third parties might be less willing to deal with the Government, because they would fear that their sensitive commercial information may be released under the Act if they could not meet the injury tests set out in the other paragraphs. The uncertainty of the protection of such information could have a negative impact on the operations of the Government.

In certain circumstances, a third party may be required to provide its information to the Government. For example, a company in the health sector that wishes to market a new drug that it has developed must have the drug approved by Health Canada. This necessitates the provision of confidential, commercial information about the new drug. Currently, this information would be protected by paragraph 20(1)(b). If the provision were repealed, it could be more difficult to protect this type of information. The company may not be able to demonstrate that the release of this information would cause a *material* financial loss, given that the drug has not even been approved yet or tested on the market. Similarly, the company might not be able to demonstrate that the release of the information could reasonably be expected to prejudice its competitive position.

The Information Commissioner proposes that government institutions not be able to use section 20 whatsoever to protect "details of a contract or a bid for a contract with a government institution." The Committee may wish to consider the following two issues: first, the proposal makes no distinction between successful and unsuccessful bids, and second, the proposal makes no reference to whether or not the contract has been awarded.

This proposal could lead to a situation where, for example, a government institution that has received a request under the *ATIA* for the bids for a government contract that has not been awarded yet would be unable to protect this information. Further, even after a contract has been awarded, the government institution would be unable to protect the details of unsuccessful bids, despite the fact that the release of this information could prejudice the competitive position of an unsuccessful bidder.

In this regard, the Information Commissioner's proposal goes considerably farther than current practice and case law, which has established the principle that there is no reasonable expectation of confidentiality in relation to a successful bid once the contract has been awarded.[1]

It is possible that some third parties may feel that section 20 does not offer enough protection. The Federal Court has been very careful to allow this exemption to be applied only in limited circumstances. Third parties may wish to express concerns about the repeal of paragraph 20(1)(b) and the proposed amendment to paragraph 20(2)(b). The Committee may wish to hear the views of third party organizations that provide commercial, financial, scientific and technical information to government institutions on the Information Commissioner's proposed amendments to Section 20.

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[1] *Société Gamma Inc*. v. *Canada (Secretary of State)* (1994), 79 F.T.R. 42.

b. Section 21—Advice, Deliberations, etc.

Subsection 21(1) is a discretionary, class exemption that allows the head of a government institution to refuse to disclose records containing: advice or recommendations to the government; an account of consultations or deliberations; government negotiation plans; or government personnel or administrative plans that have not yet been put into operation, if the record came into existence less than 20 years prior to the request.

The Information Commissioner proposes to add injury tests to the exemptions in paragraphs 21(1)(a) to (c). In addition, he proposes to reduce the scope of Section 21 so that only advice and deliberations are protected, not factual information and other materials. The period of protection would be limited to 5 years. Finally, the Commissioner proposes to define narrowly the term "advice" for the purposes of section 21.

Considerations:

Section 21 protects the development of professional and impartial advice by the public service on sensitive policy and operational matters. Section 21, in effect, preserves the full and frank flow of ideas among public officials participating in the decision-making process. Adding an injury test to section 21 could endanger the unimpeded flow of discussion within government that is essential to effective decision-making, and could erode the ability of government to govern.

The proposal to narrow the scope of the section by listing categories of information that would not be protected may be a useful approach to encourage the release of information that is not advice or deliberations. This proposal could help to strike a more appropriate balance between disclosure and the exemption of information that still merits protection.

The Committee may wish to consider the proposal to reduce the timeframe for this protection in connection with the periods of protection for other types of information (such as Cabinet confidences) and to consider whether reducing the protective period from 20 to 5 years, as suggested by the Information Commissioner, could compromise the frankness or candour of advice being provided to the government.

It is not clear what the advantage would be in defining the term "advice" as suggested by the Information Commissioner. The Committee may wish to consider how the Federal Court of Appeal dealt with the meaning of "advice" in the *Telezone* case.[2] In that case, the Court held that the term "advice" includes:

1) an expression of opinion on policy matters, but excludes information of a largely factual nature, unless it is so intertwined with the advice that severance is precluded;

[2] Canada (Information Commissioner v. Canada (Minister of Industry) (2001), 14. C.P.R. 449 (F.C.A.).

2) uncommunicated advice developed by or for a government institution or a minister of the Crown (e.g., personal notes created in preparation of a meeting);

3) inconclusive advice (the advice need not urge a specific course of action to fall within the exemption); and

4) advice that has been approved.

The Court further held that "advice" should be given a broader interpretation than "recommendation" otherwise the latter term would be redundant.[3] The Court stated that the exemption must be interpreted in light of its purposes, namely removing impediments to the free and frank flow of communications within government departments, and ensuring that the decision-making process is not subject to the kind of intense outside scrutiny that would undermine the ability of government to discharge its essential functions.

The Committee may wish to consider the views of current and former senior managers of government institutions.

c. f. Section 23—Solicitor-Client Privilege

Section 23 is a discretionary, class exemption. Section 23 permits the head of a government institution to refuse to disclose records containing information subject to solicitor-client privilege.

Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Solicitor-client privilege is a class privilege based on a presumption that disclosure of the communications between a client and his or her lawyer would erode the candour necessary to a relationship between solicitor and client. The doctrine of solicitor-client privilege has been recognized as a principle of our legal system for over 300 years. The Supreme Court of Canada has described the privilege as "nearly absolute."[4]

The common law recognises the relationship between lawyers advising government and their government clients as one attracting solicitor-client privilege to the same degree as those between private sector actors and their counsel.[5] Solicitor-client privilege is considered to be a cornerstone principle of the legal system, whether in the private sector or within government.[6]

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[3] Telezone (F.C.A.), supra footnote 4, at para 50.

[4] *Lavallee, Rackel and Heintz v. Canada* [2002] 3 S.C.R. 209, at para. 36 citing with approval the decision of Dickson, J. in *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145.

[5] *R. v. Campbell* [1999] 1 S.C.R. 565, at para. 49.

[6] *Pritchard v. Ontario (Human Rights Commission)*, [2004] S.C.R. 809.

It is important to note that solicitor-client privilege does not cover merely the opinions provided by counsel, but also applies to all the communications made to counsel by the client to obtain that advice, as well as advice given in the course of drafting of legislation, the preparation of litigation, advising on individual rights, the functioning of government programs, investigations, and government transactions.

The exemption in section 23 ensures that the government has the same protection for its legal documents as persons in the private sector. The exemption was made discretionary to parallel the common law rule that the privilege belongs to the client, who is free to waive it.

The Information Commissioner proposes to add an injury test to section 23. The section would state that information subject to solicitor-client privilege could only be protected if the disclosure of that information "could reasonably be expected to be injurious to the interests of the Crown."

Considerations:

The impact of the amendment proposed by the Information Commissioner is much broader than the impact suggested in the explanatory notes that accompany his legislative proposals. The proposed amendment opens to potential disclosure all information provided to or communicated by the Attorney General and his agents in conducting the legal business of the government.

The Committee is therefore encouraged to consider whether the introduction of an injury test would result in the stifling of communication between government lawyers and the Ministers, officers and public servants who are the "clients" of those lawyers.

It is suggested that the addition of an injury test to section 23 could lead to greater risk of disclosure, given the difficulty of proving injury that could arise by releasing a particular document. This may also have some impact on the ability of government to confide in its legal agents, and may affect the willingness of some private sector counsel to take on work on behalf of the government.

By affecting the willingness of government players to confide in the representatives of the Attorney General, the proposed amendment could compromise the ability of the Attorney General to represent the legal interests of Canada and so undermine the contribution of the Attorney General to the effective functioning of Canada's legal system.

The proposed amendment would change materially the present state of the law, in which the privilege between the government institutions and their counsel is a class privilege, and is on the same legal footing as solicitor-client communications in the private sector. With the addition of an injury test, solicitor-client privilege within the context of the federal government would be transformed into a case-by-case privilege. This would be a significant change in the current law, and would overturn what the Supreme Court of

Canada has recognised as a principle of substantive law and part of the fundamental law of Canada.

It should also be noted that no provincial freedom of information act in Canada applies an injury test to the solicitor-client privilege exemption. The same can be said for the federal freedom of information acts found in the United Kingdom, Australia, Ireland and New Zealand.

In its study of solicitor-client privilege, the Committee may also wish to consider the Information Commissioner's proposal to amend section 25 to add the following:

> Where, under subsection (1), a part of a record is, for the purpose of being disclosed, severed from a record that is otherwise subject to solicitor-client privilege, the remaining part of the record continues to be subject to that privilege.

The Information Commissioner states that this amendment would settle the issue of whether the disclosure of a portion of a record protected by solicitor-client privilege would jeopardize the privilege for the remaining, non-disclosed portion. Solicitor-client privilege could be undermined, however, by this proposed amendment because parties such as the Information Commissioner could bring enormous pressure on government to release supposedly innocuous portions of protected documents.

The Committee may wish to invite the views of the Canadian Bar Association and members of law societies on matters relating to solicitor-client privilege.

d. Section 24 / Schedule II – Statutory Prohibitions

Section 24 sets out a mandatory, class exemption from disclosure. It provides that a government institution shall refuse to disclose any record that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II of the *ATIA*. It is viewed by many institutions as the strongest guarantee against disclosure an exemption can provide.

The Information Commissioner proposes to repeal section 24 and Schedule II. He states that there is adequate protection elsewhere in the Act for the documents protected under the mandatory section 24, and that this "secrecy" provision undermines the efficiency of the Act.

Considerations:

The inclusion and use of section 24 has been debated almost since its inception. Some believe that section 24 and Schedule II are necessary to protect valid confidentiality regimes, while others believe that this type of provision detracts from the principles and goals of open and accountable governance that underlie access to information regimes. Many stakeholders who provide information pursuant to provisions listed on Schedule II are reassured by the mandatory exemption under section 24, as they view it as clear and unequivocal. The freedom of information statutes of Australia and the United Kingdom

have similar exemptions for documents that are covered by the confidentiality provisions of other statutes.

It is suggested that there is merit in retaining this exemption in the *ATIA* to safeguard information requiring a very high degree of protection not afforded by the other exemptions, such as income tax information and census data. Canadians provide such information to the Government on the understanding that it will be treated as absolutely confidential. Further, the current protections for information collected pursuant to the *Canadian Security Intelligence Service Act*, the *Criminal Code of Canada*, and for sensitive aeronautic, marine and other transport information, are consistent with the government's commitments to national security, public safety and law enforcement. The repeal of this mandatory protection could cause international allies to lose confidence in the ability of the Government to protect sensitive information which could, in turn, put the Government's relationships with its international allies at risk.

In considering the Information Commissioner's proposal, the Committee may wish to study the impact that the loss of the protection of section 24 would have on the information protected in the provisions, and consider whether the sensitive information currently covered under section 24 would be adequately protected elsewhere in the Act. In particular, the Committee may wish to invite the views of government institutions that benefit from the mandatory exemption under section 24 (such as the Canadian Security Intelligence Service, Canadian International Trade Tribunal, Statistics Canada, Canada Revenue Agency, Canada Border Services Agency, Public Security Canada, and the Business Development Bank of Canada).

Instead of repealing section 24, the Committee may wish to consider adding criteria and a review process to section 24 to govern the addition of provisions to Schedule II. This approach would ensure that only specified classes of sensitive information benefit from the clear protection provided by section 24. These criteria could capture only those confidentiality provisions that prohibit disclosure to the public in absolute terms, or set out clearly-defined limits on any discretion to disclose. The Committee could also consider amending the Act to allow the Governor-in-Council to add a confidentiality provision to the Schedule only if it meets such strict criteria.

In doing this, the Committee could consider the following criteria:

1. Whether the information referred to in the provision protects

    a. national security;

    b. the enforcement of any law of Canada or a province;

    c. public safety;

    d. large amounts of personal information the collection of which is necessary to carry out the mandate of the government institution; or

e. information which is absolutely necessary to the exercise of the core mandate of the government institution

2. Whether any other provision of the Act would be sufficient to provide the necessary level of protection for that information.

3. Whether the provision in question is carefully drafted, so as to protect only the information that is absolutely necessary.

Examples of the types of information currently protected under section 24 that would meet the above criteria and should therefore maintain their section 24 protection include tax payer information, census data information, information in the DNA databank, records subject to a court-ordered sealing order, and information about security measures.

e. General Public Interest Override

The Information Commissioner proposes that the following section be added to the Act:

> Notwithstanding any other provision of this Act, the head of a government institution shall disclose a record or part thereof requested under this Act, if the public interest in disclosure clearly outweighs in importance the need for secrecy.

Considerations:

As drafted, this proposed provision is very broadly worded. The practical result of this amendment would be that the head of any entity covered by the Act would be required to disclose any document that could normally be protected using one of the exemptions, if the public interest in disclosing the document were stronger than the need to keep the document confidential.

A public interest override as broad and as general as what the Information Commissioner is proposing is not without precedent in Canada. The freedom of information statutes in British Columbia, Alberta, and Nova Scotia contain public interest overrides that are as broad. Furthermore, in these provinces and in Ontario and Newfoundland there is also a public interest override that is connected to protection of the environment, public health or public safety.

Looking internationally, the United Kingdom is a country that passed freedom of information legislation quite recently. In that Act, the public interest override is broad in scope (that is, not restricted to public safety, for example). In that legislation, the public interest override applies only to discretionary exemptions; it does not apply to the mandatory exemptions that protect the most sensitive information including, for example, personal information and parliamentary privilege.

There are several key issues that the Committee may wish to consider in relation to a public interest override. First, the Committee could consider how broad the override should be, both in scope and in application. Here, scope refers to the breadth of the override itself—that is, whether it is general or restricted to, for example, public safety or

health or the protection of the environment. Application refers to whether the public interest override should apply to all exemptions (including, for example, those that protect the confidential information of commercial third parties or foreign governments) or whether it should be limited in its application to exemptions that protect less sensitive information. It is suggested that the public interest override should not undermine the mandatory exemptions in the public interest (that is, section 13, subsection 16(3), section 19, section 24, as well as the mandatory exemptions provided to Agents of Parliament in the proposed *Federal Accountability Act*). Again, with reference to information obtained in confidence from other governments, it should be noted that a public interest override applied to information protected by mandatory exemptions could undermine the confidence of the Government's international allies and affect the Government's relationships with other governments.

As was stated previously, most of the exemptions in the Act are currently discretionary. In essence, this means that the head of a government institution must exercise this discretion before withholding specific information. Part of the exercise of the discretion in the Act comprises an assessment of whether the public interest would clearly be in favour of disclosing the information. A possible approach, therefore, could be to include a provision that when the head of the institution exercises discretion in applying an exemption, the head must weigh the interest of the government institution against public interest.

As stated earlier, public interest override provisions currently exist in two sections of the Act – section 19 and subsection 20(6). In its analysis of a general public interest override, the committee may wish to take into account the public interest override found in the other provisions of the *ATIA*.

4.3 Approaches to Reform of Exemptions Scheme

In its Report of June 2002, the Access to Information Review Task Force suggested that the overall structure of the *Access to Information Act* is sound, and that the current exclusions and exemptions strike the right balance between the public interest in disclosure and the need to protect certain information in the public interest. Instead of reforming the scheme in the manner proposed by the Information Commissioner, we believe that it would be useful to focus on each exemption, so that each one may be clarified or modernized in a way that ensures they continue to fulfil their purpose and, at the same time, reflect new realities. Also, since the *ATIA* may be extended to apply to other entities, some of the exclusions and exemptions may need to be reviewed to ensure they are appropriate and effective for the new entities.

f. Clarifying Existing Protections

To this end, the Government seeks the views of the Committee on a number of proposals that could improve the current exemptions scheme, many of which were suggested by the Information Commissioner:

- Clarifying that the expression "foreign state" in the section 13 exemption for information obtained in confidence from other governments includes subdivisions of foreign states (e.g., a state in the United States of America); and further, that it may be appropriate to include in this expression an entity outside Canada that exercises functions of a government but that Canada does not recognize as a state;

- Creating a new schedule to list aboriginal governments for the purpose of section 13, to facilitate additions of future aboriginal governments;

- Replacing the word "affairs" in subsection 14(b) with the word "negotiations", to narrow the exemption if that does not damage the interest involved;

- Clarifying that an audit falls within the definition of investigation for the purposes of section 16;

- Extending the section 17 exemption for information the disclosure of which could reasonably be expected to threaten the safety of individuals to include threats to an individual's mental or physical health; and further to extend the exemption to protect the human dignity of an individual, even if that individual is dead;

- Creating an exemption to protect endangered species and sensitive ecological or historical sites; this exemption could also be amended to include sacred aboriginal sites;

- Clarifying that the subsection 18(b) exemption for information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution includes *part* of an institution;

- Clarifying that the subsection 18(d) exemption for information the disclosure of which could reasonably be expected to be materially injurious to the financial interests of the Government of Canada includes all or part of a government institution (this proposal will be implemented through the adoption of the *FAA*);

- Providing that the section 18 protection of the government's economic interests does not cover the results of product or environmental testing;

- Providing that the section 20 protection of third parties' economic interests does not cover the results of product or environmental testing; however, the Committee may want to further study the Information Commissioner's proposal to extend the subsection 20(2) exception to details of a contract or a bid;

- Clarifying that subsection 20(2) also applies to part of a record (though the Committee may wish to consider whether this amendment is superfluous, as section 25 applies);

- Clarifying the scope of the section 21 exemption for advice or recommendations by including a list of types of information not covered by the exemption (e.g., factual information, public opinion polls, statistical surveys, etc.); and

- Limiting the protection in section 21 for personnel management or administrative plans not yet in operation to five years from the date of rejection or the date on which work was last done on the plan.

g. Extending Current or Creating New Exemptions

i) Critical Infrastructure Information

In its Report of June 2002, the Access to Information Review Task Force recommended a clarification concerning the application of the section 20 exemption for third party information to information about critical infrastructure vulnerabilities that a third party provides to the Government. The specific exemption in paragraph 20(1)(b) for "financial, commercial, scientific or technical information that is confidential information" could be interpreted as including information about critical infrastructure vulnerabilities, such as details of communications and other systems used by airports.

An added measure of reassurance could be provided to third parties operating critical infrastructure, such as airports, by amending Section 20 to clarify that it extends to such information.

ii) Draft Audit Reports

Currently, it is unclear whether draft reports of internal audits or related working papers are exempt from disclosure in all circumstances. Internal audit records should be protected for a period of time that is sufficient to allow internal auditors to effectively carry out their function. Internal audit working papers and draft reports require protection for a reasonable period of time. To avoid any possible abuse of such a provision by keeping reports in draft form indefinitely, unfinished draft reports could be disclosed within a certain time period, if no final report is delivered. Without such an exemption, the ability of internal auditors to meet professional standards could be compromised. This is why this exemption was introduced in the proposed *Federal Accountability Act*.

iii) Settlement or "Without Prejudice" Privilege

Another exemption the Committee may wish to consider relates to the protection of information related to the settlement of legal disputes. Settlement privilege is a rule of admissibility of evidence, and is meant to encourage settlement of disputes without recourse to litigation. It does so by precluding the admission into evidence of certain settlement communications, where the communication is being introduced to establish it as evidence of liability or a weak cause of action, or to "embarrass" the other party before the court. Although by definition both sides are aware of the contents of the settlement communication, the rule states that it cannot be put before the judge.

Settlement privilege (also known as "without prejudice" privilege) is not part of solicitor-client privilege, and therefore records protected by settlement privilege may not be protected from disclosure in response to an access request under section 23. The addition of an exemption for settlement privilege would ensure that the government has the same protection as persons in the private sector. This would also provide certainty that parties engaged in settlement negotiations with the government would not be vulnerable to the disclosure of their settlement records. The Government welcomes the view of the Committee on this particular issue.

5. Administrative Reform

The Information Commissioner has made a number of recommendations for changes to the administrative processes under the *ATIA*, ranging from fees, to time limits, to the right of access, to general procedures. In this section, the various components of administrative reform are discussed.

5.1 Universal Access

Under the current legislation, only Canadian citizens and those present in Canada, including corporations, have a right of access to information contained in records held by the government of Canada.

The Information Commissioner has recommended that **any** person, regardless of citizenship or place of residence, be extended that same right. This universal right of access would also apply to corporations located anywhere in the world.

Considerations:

The proposed amendment would bring the Canadian legislation in line with other jurisdictions, such as Australia, Ireland, New Zealand, the United Kingdom and the United States. Further, in today's global and electronic environment, it is becoming increasingly difficult to identify the place of origin of requests. The current methods of using return mail addresses and postmarks to identify whether a requester is "present in Canada" are ineffective in dealing with electronic requests.

Some have speculated that this proposed change to the *ATIA* will have little impact on the volume of requests received by the Canadian government, while others have said the contrary. It is, however, agreed that government organizations with an international component, such as Citizenship and Immigration Canada or Foreign Affairs and International Trade Canada, would be the most susceptible to a large volume increase of requests as a result of a universal right of access.

Canadian taxpayers fund the access system and would therefore fund the right of foreign requesters. It is difficult to accurately predict costs, as these would be directly tied to the volume of foreign requests received. However, the cost to taxpayers could be as high as $20 to $25 million over five years. To offset costs, it has been suggested that a varying

fee structure be implemented with a full cost recovery scheme for foreign requesters - much as universities charge varying tuitions to domestic and foreign students. Institutions, however, may not be able to differentiate whether a domestic requester is asking for information on his or her own behalf, or seeking access to records on behalf of a foreign requester looking to avoid the higher fees.[7]

Extending the right of access to any person (regardless of geographic location) may result in the need to broaden the grounds for extending the time limits. A new extension provision may be required to accommodate situations where the requested records are located abroad and the expertise to review the records is in Canada. Simply retrieving records from remote locations may take more than 30 days (see section under the heading "Timeframes").

If the proposal for universal access is accepted, the *Privacy Act* must be similarly amended, since the trend towards universal access is even greater in the area of privacy. Recently, the Canada Border Services Agency was required to sign a treaty with the European Union (EU), effectively guaranteeing EU travellers a right to request access to their personal information held by the Agency.

5.2 Public Register

The Government does not currently make public the nature of records disclosed under the *Access to Information Act*. However, the Treasury Board requires, through policy, that all government institutions register their requests in an internal coordination system, known as the Coordination of Access to Information Request System (CAIRS). The summaries of requests logged in CAIRS are disclosed on a monthly basis.

The Information Commissioner has recommended that the *ATIA* be amended to provide that "every government institution shall maintain a public register containing a description of every record disclosed in response to an access request." The Commissioner noted that the register would allow members of the public to see a cumulative list of records that have been released, and allow government institutions to keep track of such material.

Considerations:

A public register could be a useful tool with benefits for both the public and the government, fostering greater access and transparency. The register could also help government identify whether a record had been disclosed previously and ensure a consistent application of the legislation.

[7] While a varying fee structure may have some advantages, any change to the current Access to Information fee structure would trigger the application of the *User Fees Act* (see section on "Fees" further in this document).

A requirement for translation is an important consideration with respect to the register. In accordance with the *Official Languages Act*, information the government makes available to the public must be equally available in English and in French. The Government currently responds to some 25,000 requests under the *Access to Information Act* each year, some covering hundreds or thousands of records, while others have but a few. Assuming that requests average 100 records, translation costs for the register would be in the area of $250 to $270 million over a five-year period. The management of the register could add another $30 to $40 million or more to the cost.

The costs alone may place this recommendation out of reach. Consultations may be required to determine the willingness of taxpayers to support it. It would also be worth consulting those in the translation field to determine whether the industry could support such a significant increase in work volume.

As an alternative to the register suggested by the Information Commissioner, the current model used by National Defence (ND) could be expanded to all institutions covered by the *Act*. ND currently posts on its web site a summary of most of the requests it has completed. Only the summary of the request is translated (the records themselves are available in the language requested by the original applicant). Translation costs associated with this type of model are estimated to be in the range of $2 to $3 million over five years.

5.3 Timeframes

Under the existing legislation, the 30-day response period can be extended where there is (a) a large volume of records involved in the processing of a particular request; (b) when consultations are required which cannot be completed within the time limits (excluding third parties); or (c) consultations are required with third parties (primarily private industry).

a. Proposed new extensions

- Multiple requests

The Information Commissioner proposes that the *ATIA* be amended to allow government institutions to extend the time limit for responding to requests in cases where a requester makes a number of requests on the same subject matter within a 30-day period.

Considerations:

This new extension is intended to provide institutions with greater flexibility. It takes into consideration situations where requesters split requests in order to avoid extension of the timeframe and to take advantage of the five free hours of processing time allotted to each request. Under the proposed amendment, government institutions would be able to aggregate requests made by the same applicant on the same topic and received within a 30-day period.

While applicants may still be able to circumvent the intent of this section by asking another person to act of their behalf, the recommended change is viewed as a positive one.

- Geographic location

The Information Commissioner has not proposed any changes in the time limits contained in the *ATIA* to accommodate the burden of retrieval of records from remote locations.

Considerations:

As referenced under the section on "Universal Access", extending the right of access to any person (regardless of geographic location) may result in the need to broaden the grounds for extending the time limits to accommodate situations where the requested records are located abroad, but the expertise to review the records and the authority to decide on disclosure or the application of exemptions rests with the Access to Information Coordinator in Canada.

b. Clarification of existing wording – government consultations

The *Access to Information Act* provision regarding consultation extensions reads "The head of a government institution may extend the time limit …if consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit" [emphasis added].

The Commissioner recommends inserting the words "with other government institutions" after the word "consultations."

Considerations:

This wording proposed by the Commissioner is intended to clarify that extensions cannot be taken for intradepartmental consultations. Such an amendment would be consistent with Treasury Board guidelines and interpretation, as well as current practices. The precise wording proposed, however, would not allow for consultations with other entities such as individuals or businesses that are not government institutions. For that reason it is suggested that the wording be adjusted to "… if consultations outside the government institution are necessary…".

5.4 Notification of Deemed Refusals

Requests are considered to fall into a deemed refusal status when they have not been answered within the deadlines (either the original 30-day period or within an extended period).

The Information Commissioner recommends that the *ATIA* be amended to require government institutions to notify the requester and the Commissioner when there has

been a deemed refusal. The Commissioner has indicated that he would use the notices to monitor performance and identify which institutions are chronically late.

Considerations:

Many institutions already contact requesters informally when they are late. The proposed change would make such notification mandatory and would also require notification of the Information Commissioner.

Notice to requesters is fully supported, thus allowing applicants to make an informed choice whether to lodge a complaint with the Information Commissioner or not (many choose not to do so for a variety of reasons). Many applicants are content or even prefer to wait to allow institutions the time required to respond to their requests (even though the requests are technically in deemed refusal status).

Taking into consideration the Commissioner's authority to self-initiate complaints and to launch investigations, the proposed amendment could remove the requester's ability to control the processing of his or her request, as well as the government's ability to manage its deemed refusals and effectively interact with the applicant.

This proposed monitoring role would be a new duty for the Commissioner, and one that would overlap with the role of the Treasury Board President. The Commissioner's mandate and that of the designated Minister may therefore also require review.

5.5 Fees

The fees for access requests are set out in the Regulations. The *Access to Information Act* Regulations were established 22 years ago when the *Act* first came into effect. Most commonly used fees are:

- $5.00 application fee (includes five free hours of search and 125 free pages)
- $10.00 per hour for every hour of search beyond the five free hours
- $0.20 per page reproduction fee for requests above 125 pages

The legislation also states that government institutions may waive the requirement to pay a fee or may refund a fee.

The Information Commissioner recommends amendments to the fee structure. He argues that requesters should not have to pay **any** fees when a government institution fails to meet a deadline. The Commissioner also sets out four criteria to be taken into account by institutions in the consideration of fee waivers (for reasons other than deemed refusals). The criteria touch primarily on the public's interest in the information to be released.

Further, the Commissioner's proposal to aggregate requests for the purpose of invoking time extensions (see section above on "Timeframes") should be considered for the application of fees.

Considerations:

The *Access to Information Act* does not, and was never intended to, operate on a cost recovery basis. Fees paid by applicants are very modest, particularly when compared to the costs of administering the *ATIA*.

Amendments to the *Access to Information Act's* fee structure would trigger the application of the *User Fees Act*. In accordance with the *User Fees Act*, before any changes to the schedule of fees are made, extensive consultations would be required with stakeholders, such as applicants, provincial counterparts, foreign states, etc. The change would also trigger the introduction of a sliding scale for performance. Where a government institution's performance in a particular fiscal year did not meet the standards (namely time delays) by a percentage greater than 10 per cent, the user fee would be reduced by a percentage equivalent to the unachieved performance, to a maximum of 50 per cent of the user fee. The reduced user fee would apply for the whole of the following fiscal year. For example, if an institution were late 25 per cent of the time, then it could only charge an application fee of $3.75. The same reduction would apply to search and reproduction fees. Requesters would quickly become confused and frustrated with a fee structure that would vary from institution to institution and from year to year.

Further, making the requirement to waive fees mandatory, as recommended by the Information Commissioner in cases of deemed refusals, could inadvertently penalize taxpayers, as often it is the fees which encourage the focusing of requests to manageable sizes. In addition, requests can be late for a variety of reasons, some of which are outside the control of the institution processing the request. Notwithstanding, many institutions voluntarily waive fees when they are late in responding.

With respect to aggregate requests as explained under the section for "Timeframes", clear direction would be required to ensure that fees would be similarly applied. Time extensions and fees are generally applied in conjunction. In other words, if multiple requests on a similar topic by the same applicant were aggregated as one for the purpose of a time extension, then the applicant would similarly only be required to pay one application fee of $5.00, which would entitle him or her to only five free hours of search and 125 pages at no charge.

Finally, with reference to "Universal Access", as mentioned previously, a varying fee structure, with a full cost recovery scheme for foreign requesters, may be considered. Immigration files would be particularly susceptible to situations where a domestic immigration information broker could pay $5.00 to a department, but charge fees of $1,000.00 or more to immigration applicants. This could redirect moneys intended to offset the cost to taxpayers of universal access into the hands of information brokers.

5.6 Format

Section 12 of the *Access to Information Act* gives applicants a right to examine records or to receive a copy thereof. The *Access to Information Act* Regulations further clarify that

the head of the government has the authority to decide whether the requester be given an opportunity to examine the record or be provided with a copy of the record depending on:

- the length of the record(s);
- whether the format lends itself to reproduction;
- whether the reproduction of the requested information is prohibited by or under another Act of Parliament; and
- whether information would be disclosed where otherwise it would be refused under the *ATIA*.

The Commissioner recommends changes to the section to give applicants the right to choose the format in which to receive their records, provided the choice is reasonable.

Considerations:

The amendment is intended to cement existing practices. At present, institutions consider the wishes of requesters when deciding whether to give copies (paper or electronic) or allow applicants to view the records. Wherever possible, institutions act in accordance with the preferences of the requesters. Electronic records are becoming increasingly popular with requesters, as the $0.20 per page reproduction fee is not applied.

The regulations would need to be modified to clarify what constitutes a "reasonable choice."

6. Duty to Document

Good information management is a prerequisite of good decision-making, good program and service delivery and of accountability. There is a consensus that information management in the government of Canada has declined alarmingly over the past three decades. There are numerous reasons for this decline, including the conversion from paper-based to electronic records, the reduction of resources and staff dedicated to documentation and information management, and a lack of training throughout the public service for individuals who are now expected to be their own information manager, and who are expected to understand and apply all of the related legislation and policies.

Currently, there are a number of statutory requirements for the public sector to create records in specific circumstances, such as:

- under the *Financial Administration Act* Treasury Board is empowered to prescribe obligations relating to departmental account keeping of public money and/or record keeping in relation to public property. That Act also imposes a duty on various persons to keep a variety of financial records and to prepare financial statements and an annual report on Public Accounts, providing a general duty to

document the financial administration of the government so that it is accountable to the public.

- The federal government, as an employer, has a duty to keep employment records, as well as pension records, pursuant to the *Employment Equity Act,* the *Employment Insurance Act* and a number of other statutes and regulations.

In addition, the Treasury Board policy on the Management of Government Information requires that government institutions document decisions and decision-making processes to account for government operations, reconstruct the evolution of policies and programs, support the continuity of government and its decision-making, and allow for independent audit and review.

In his proposals, the Information Commissioner has addressed this issue through a requirement to create adequate records to allow a subsequent understanding of the decisions made and the actions taken. He has proposed adding to the *Access to Information Act*:

> Every officer and employee of a government institution shall create such records as are reasonably necessary to document their decisions, actions, advice, recommendations and deliberations.

He has also proposed that a related sanction be added to section 67.1 of the *ATIA*:

> 67.1(1) No person shall, with intent to deny a right of access under this Act.
>
> (a) destroy, mutilate or alter a record;
>
> (b) falsify a record or make a false record;
>
> (c) conceal a record;
>
> **(c.1) fail to create a record in accordance with section 2.1; or**
>
> (d) direct, propose, counsel or cause any person in any manner to do anything
>
> mentioned in any of paragraphs (a) to (c.1).

When considering the Information Commissioner's proposals there are several significant issues which require attention:

- the duty must be precise enough that public servants can have a clear understanding of what is expected of them. They must be able to distinguish circumstances which give rise to the duty and when they would be contravening the duty; and

- the duty must be narrow and specific if a sanction is to be applied.

The duty of public servants to adequately record their decisions and actions is generated by the need for the documentation of the business of government and the requirement for

good information management. It is only indirectly related to providing the public with access to such records. In order to effectively serve the broader purpose, it may be appropriate to position the duty with other information management requirements. After examining how other jurisdictions have dealt with this issue, it appears that the duty could be best placed in the *Library and Archives of Canada Act*. In that way, the rules governing both the creation of records and their eventual disposal, which are presumably based on many of the same principles, would be brought together.

Another issue for consideration which flows from the previous discussion concerns the appropriate sanction which should be applied when public servants fail to create records when they should. There are several possibilities to address this issue, and each raises its own questions. Obviously, there must be a distinction between poor record keeping and intentional, bad (or even criminal) behaviour.

Penalties for public servants who fail to create a record could range from disciplinary measures through an administrative monetary penalty to a criminal offence. Whatever sanction is applied, it must be commensurate to the misbehaviour. It may be appropriate to make it a criminal offence to fail to create a record if that is done for the purpose of preventing anyone from finding out about a particular decision or action (whether that decision or action was itself improper or not), or to prevent anyone from obtaining access to a record of the decision or action through the *Access to Information Act*. Such a sanction would be in line with the current sanction provision in section 67.1 of the *ATIA* concerning the destruction, altering or concealing of a record for the purpose of denying access.

On the other hand, good information management practices must be learned, including rules or standards about when records should be created. Public servants who misunderstand the rules or who inadvertently fail to document an action or decision (perhaps they thought someone else at the meeting was taking the minutes, or they were distracted and never returned to document their action) are not engaging in criminal behaviour. Instead, they are failing to meet administrative standards, and should be dealt with accordingly, perhaps through disciplinary measures.

Before any sanction can be applied, there would need to be a wide-scale training effort to ensure that every public servant, at all levels, would be made aware of their responsibilities, and would have the opportunity to clarify the new requirements. Before any training can take place, the appropriate standards must be developed, and interested parties ranging from the Information Commissioner to the Chief Information Officer to the public sector unions must be consulted on them.

Whether a duty to document is enshrined in legislation or strengthened in policy, the need for a substantial training effort is clear. The culture of the public service must evolve in a way which makes the proper creation and management of information a routine part of everyone's day. While the cost of such a training effort would be substantial, it would be significantly less than the future cost to the government as a result of lost corporate memory.

Although codifying the duty to document may not be necessary, the principle behind the proposal appears to be sound. Translating this principle to practical application must be done carefully, however, and with a thorough consideration of the results, both intended and potentially unintended.

7. Role of the Information Commissioner

7.1 Investigation of complaints

The primary role of the Information Commissioner is to investigate complaints made by dissatisfied requesters under the *Access to Information Act*. At present, the Information Commissioner is an ombudsman: he makes recommendations to institutions concerning the resolution of complaints and can, with the agreement of the requester, go to court to challenge a denial of access. Furthermore, the Information Commissioner reports to Parliament on an annual basis on matters relating to complaints and their outcomes.

The Information Commissioner currently has very strong powers that support him in the conduct of his investigations. He can summon and enforce (by subpoena) the appearance of persons before him and compel them to give evidence or produce documents, administer oaths, enter any premises occupied by any government institution, and examine any record held by a government institution (excluding Cabinet Confidences).

The Information Commissioner can investigate complaints on behalf of a requester relating to denial of access, fees, extensions of time limits and delays, the official language or format of access, or any other access related matter. Where the Information Commissioner believes there are reasonable grounds to investigate a matter relating to requesting or obtaining access, he may choose to initiate his own complaint.

The Information Commissioner has proposed a number of amendments to the investigative process under the *ATIA*.

7.2 Proposals

The Information Commissioner has proposed deleting the words "reasonable grounds to investigate" with respect to self-initiated complaints, although the interpretation of "reasonable grounds" is currently left to the good judgement of the Information Commissioner. It is not clear why the Information Commissioner would want to commence an investigation that he himself does not consider to be reasonable. If, as he notes, this change is intended to allow his office to conduct audits or systemic investigations, then he may wish to propose that he be given a clear mandate to conduct such activities, and the relevant issues may then be fully discussed.

Section 64 of the *ATIA* currently requires that the Information Commissioner take every reasonable precaution to avoid the disclosure of information protected / withheld by a government institution. However, he recommends a number of amendments to the legislation that may weaken or erode this requirement.

The Information Commissioner proposes that the grounds under which he may disclose information be broadened. He adds a new section that would allow him to disclose information he feels would allow a party to make more meaningful representations to his office during the conduct of an investigation.

Representations before the Information Commissioner are intended to be conducted in confidence. This allows all parties, in their turn, to be forthcoming and candid - necessary prerequisites for effective investigations. The Information Commissioner proposes that he be authorized to admit any individual to witness representations being given before him. He proposes adding the bolded text to the following section of the *ATIA:*

…**unless authorized by the Information Commissioner, and subject to section 64,** no one is entitled as a right to be present during, to have access to or to comment on representations made to the Commissioner by any other person [emphasis added].

An unintentional consequence of his proposals may be that the government could be reluctant to make full and complete representations to the Information Commissioner when it justifies its refusal to disclose records requested under the *ATIA* based on a fear that its representations - which themselves may contain confidential information - will be disclosed by the Commissioner to the complainant or any other third party. The result will be that the Commissioner's findings and recommendations will be based on incomplete information. Such a result is in no one's interest, and is more likely to lead to litigation, an outcome that could have been avoided if the government could trust that the Information Commissioner's treatment of sensitive or confidential information in representations would not be disclosed to the complainant.

7.3 New grounds for complaints

- Improper requests

The Information Commissioner proposes a new provision be added to the *ATIA* to allow government institutions to refuse to process requests which are improper. The proposed change would allow the Information Commissioner to receive and investigate complaints from institutions that believe that an access request should be disregarded as being contrary to the purposes of the *ATIA*.

The proposed provision is intended to allow the government to refuse to process requests that are frivolous, vexatious or abusive. Many jurisdictions have such a provision in their legislation.

Under the proposal of the Information Commissioner an institution would be required to seek and obtain the approval of the Information Commissioner in order to refuse to process a request.

- Coverage

The Information Commissioner proposes including a paragraph that creates a right of complaint to his office on the function of the Governor in Council to keep under review

and add to Schedule I those institutions that should be covered by the *ATIA*. If the *ATIA* is amended to include criteria for determining the coverage of the *ATIA*, and if the *ATIA* is also amended to impose a duty on the Governor in Council to add qualifying institutions to the Schedule of the *ATIA*, it would be questionable, even in that circumstance, if it would be appropriate for an Agent of Parliament to investigate an action or decision of the Governor in Council.

- Time limits for investigations

At present, there are no time limits for the conduct of investigations by the Office of the Information Commissioner.

The Information Commissioner proposes amending the *ATIA* to set a 120 day limit for the completion of investigations, subject to possible extensions, after which requesters would have the right to proceed to Court without a finding by the Information Commissioner.

Considerations:

Setting time limits for the completion of investigations would require an increase in the Information Commissioner's staff and would place an additional burden on the stretched resources of government institutions in order to meet the legislated deadlines. Increased costs would likely be in the range of $15 to $20 million over five years.

Although this provision would likely allow requesters to have redress to the Court more quickly, they would not have the benefit of the Information Commissioner's findings beforehand. The Committee may wish to consider whether this is an appropriate compromise.

7.4 Neutral Adjudicator vs. Advocate

The Information Commissioner proposes a new section of the *ATIA* which would provide a significantly broader mandate for his office. This section would give him responsibility for monitoring the administration of the Act and a number of other new responsibilities, such as public comment on proposed legislative schemes or government programs, public awareness and public sector training, receipt of comments from the public and research "into any matter that may affect the attainment of the purposes of the Act."

Considerations:

The Information Commissioner's approach here may be a consequence of the narrow focus of his current mandate. It is understandable that he would wish to share knowledge, experience and information with the public.

An important consideration in this regard, however, is the need to co-ordinate roles between the Information Commissioner and the President of the Treasury Board who is currently the Minister designated to have certain similar responsibilities under the Act.

Perhaps it would be most beneficial if some of these responsibilities were shared between the Information Commissioner and the Minister, a step which may encourage useful interaction between these two senior parties and their officials.

The Government welcomes the Information Commissioner's proposal that he provide advice on legislation that has been introduced or government programs that have been announced. Some clarification might be needed concerning the monitoring role that could be played by the Information Commissioner and the monitoring role of the designated Minister. The Information Commissioner's recommendation that the designated Minister collect annual statistics on the administration of the *ATIA* has been included in the proposed *Federal Accountability Act*.

The Government also supports the Information Commissioner in his desire to conduct research into matters related to his duties or functions. The role of the Information Commissioner in increasing public awareness or educating the public service on their responsibilities is another area which would require careful co-ordination with the activities of the designated Minister. Perhaps this is another area where a co-operative effort could work best.

Conclusion

No jurisdiction in the world has managed to legislate an access to information system which is fast, efficient and totally satisfactory for everyone involved. The success of such systems is largely dependent on the attitudes and behaviour of the participants, which cannot be legislated. As a Committee charged with recommending measures to improve the *Access to Information Act*, you will be assisting the Government in adjusting the framework which forms the basis of our system of access. There is a widely-held view that the *Access to Information Act* is not broken, but that over time we have learned some lessons about how the system works which can help us to make it better.

A crucial aspect of such a review is an open, free-ranging discussion with stakeholders representing all aspects of the system: requesters, access officials, outside institutions which provide information to the government, organizations which are being considered for coverage and officials from institutions which may be most affected by proposed changes. This consultative process will demonstrate to the Committee the commitment of all participants to making the system work. It is a difficult task to balance competing public interests, so it must be done carefully, and it must be done thoroughly, so that no group believes that their interests have not been heard or considered, or that their views are not seen as legitimate.

The Government appreciates the importance of the work you are being asked to do, and looks forward to receiving your considered views when your work is complete. Then the Government will be able to proceed with drafting a bill to reform the *Access to Information Act* with confidence that the reforms we propose will achieve our objective of strengthening the *ATIA*.

Annex 1 – A consideration of costs

A cost study conducted in 1994, and a second in 1999 by Consulting and Audit Canada found that the direct annual cost of the *Access to Information Act* throughout government was less than $50 million. The Information Commissioner believed the figure to be inflated, while many other people in the public service firmly believed that costs were under-reported. These studies remain, however, the best objective evidence available.

The Information Commissioner's recommendations included some legislative proposals with little or no cost implications, while others would require significant resources to implement. The following is a rough estimate of the magnitude of costs associated with some of those proposed amendments to the *Access to Information Act*.

Adding institutions $40 to $45 million annually

The estimate is based on an addition of 10 institutions considered to be large, 50 new institutions in the medium range, and potentially hundreds of small institutions, given that there is no definitive list of institutions which satisfy the proposed criteria.

The estimate takes into account training, advice and support activities of the Treasury Board Secretariat and the Department of Justice, the complaint and review processes of the Information and Privacy Commissioners' offices and the Federal Court, and the resources new institutions would require to set-up and operate Access to Information and Privacy (ATIP) offices; as well as the impact on the Library and Archives of Canada (LAC) to provide information management advice to new institutions, develop and issue disposition authorities and identify and preserve records of those new institutions that are of archival value.

Public Register more than $60 million annually

In accordance with the *Official Languages Act* information made available to the public by the federal government must be in both official languages. Estimates of translation costs are based on the volume of requests received over the last five years. While many requests consist of only a few records, many include hundreds or thousands of different documents. An average of 100 documents per request has assumed. Resources will also be required to develop, populate and maintain the register.

Universal access $5 million annually

Costs have been based on the increase in workload for institutions such as Citizenship and Immigration Canada and Foreign Affairs Canada, as well potential increase in complaints received by the Information and Privacy Commissioner's offices.

Annex 1 (cont.)

Duty to document $7 million annually

Resources would be required to develop, implement and monitor the directives and guidelines required to support this initiative. Additional resources would be required by the Information Commissioner to review related complaints, as well as by the RCMP to investigate allegations of criminal misbehaviour tied to the proposed sanction.

Time limit for investigations $4 million annually

The Information Commissioner proposes a legislated time limit for investigations, resulting in pressure on the Information Commissioner's office and institutions alike to meet the new deadlines. Additional resources would be required by both groups.

Other proposals $5 million annually

The Commissioner proposes numerous other changes in a variety of areas, such as public awareness, increased training and monitoring, significantly revised exemptions and new grounds for complaints. Government institutions, the Information Commissioner's and Privacy Commissioner's offices, Treasury Board Secretariat and the Department of Justice would all require some additional resources to ensure understanding, develop supporting processes, and deliver on the expected improvements.

Total Estimate: more than $120 million annually

(When added to the current base cost of $50 million, this would more than triple the cost of the access to information program.)

Annex 2 – Table of exemptions

	Class test	Injury test
Mandatory exemptions	• Information received in confidence from other governments (s.13) • Information obtained or prepared by RCMP re: provincial or municipal policing services (s.16(3)) • Personal information (s.19)* • Trade secrets of Third Party (s.20(1)(a)) • Financial, commercial, scientific or technical information received in confidence from Third Party (s.20(1)(b))* • Information protected under other, listed statutes (s.24)	• Loss or gain to Third Party or prejudice to competitive position (s.20(1)(c))* • Interference with contractual or other negotiations of Third Party (s.20(1)(d))*
	Class test	**Injury test**
Discretionary exemptions	• Information obtained or prepared by listed investigative bodies (s.16(1)(a)) • Information on techniques or plans for investigations (s.16(1)(b)) • Trade secrets or valuable financial, commercial, scientific or technical information of Canada (s.18(a)) • Advice or recommendations to government (s.21(1)(a)) • Account of consultations or deliberations (s.21(1)(b)) • Government negotiation plans (s.21(1)(c)) • Government personnel or organizational plans (s.21(1)(d)) • Solicitor-client privileged information (s.23) • Information to be published in 90 days (s.26)	• Injury to conduct of federal-provincial affairs (s.14) • Injury to conduct of international affairs, or to defence of Canada or allied states (s.15) • Injury to law enforcement or conduct of lawful investigations (s.16(1)(c)) • Harm in facilitating commission of criminal offence (s.16(2)) • Threat to individual's safety (s.17) • Prejudice to competitive position of government (s.18(b)) • Harm in depriving government researcher of priority of publication (s.18(c)) • Injury to financial or economic interests of Canada (s.18(d)) • Prejudice to use of audits or tests (s.22)

** Denotes mandatory exemptions which include a public interest override, i.e., the information may be disclosed where the public interest in disclosure outweighs the interest protected by the exemption .*

(Access to Information: Making it Work for Canadians; Report of the Access to Information Review Task Force; June 2002.)