Office of the Information Commissioner of Canada
Commissariat à l'information du Canada

Open Government Act: Notes, Sources and References

January 2008

FORMAT:

x. (new provision)

The Open Government Act was tabled at the Standing Committee on Access to Information, Privacy and Ethics on October 25, 2005 (at the request of the Committee).

x [Content of Provision]

Rationale statement provided to Committee and Staff.

x. (existing provision as of **September 2005**)

References from Reports:

O/S: "Open & Shut : Enhancing the Right to Know and the Right to Privacy", the Report of the Standing Committee on Justice and Solicitor General (1987)

S/A: **"**Access and Privacy: The Steps Ahead" - Government response to Open & Shut (1987)

IC93-94: Information Commissioner's Annual Report (1993-1994)

IC00-01: Information Commissioner's Annual Report (2000-2001)

TF: Access to Information: Making it Work for Canadians - Report of the Access to Information Review Task Force (2002)

ICSR: Response to the Report of the Access to Information Review Task Force - A Special Report to Parliament (Response to Task Force - Information Commissioner) (2002)

C-201: An Act to amend the Access to Information Act and to make amendments to other Acts (Martin/Bryden Bill) (2004)

MFP: A Comprehensive Framework for Access to Information Reform - A Discussion Paper (Dept. of Justice) (2005)

NOTE: additional notes or comments, if any

Discussion paper: Strengthening the Access to information Act – A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act, Minister of Justice, April 11, 2006

Amendments to the Act pursuant to the ***Federal Accountability Act*** (2006, c. 9, Assent: 12.12.2006)

1. This act may be cited as the ***Open Government Act***.

Section 1 [Open Government Act]

The proposed new title of the Act better reflects its underlying purpose, which is to promote accountability and transparency in government to the fullest extent possible. This change in name is also proposed in Bill C-201.

1. This Act may be cited as the ***Access to Information Act***.

O/S: no reference
S/A: no reference
IC93-94: proposed changing name to “Open Government Act”, “National Information Act” or “Freedom of Information Act” (p. 7)
IC00-01: same as IC93-94 (p. 65)
TF: no reference
ICSR: change name to “Open Government Act”, “National Information Act” or “Freedom of Information Act”
C-201: change name to “Open Government Act” (s. 1)
MFP: no reference

Discussion paper: No comments

2.(1) The purpose of this Act **is to make government institutions fully accountable to the public, and to make the records under the control of those institutions fully accessible to the public, by extending** the present laws of Canada to provide a right of access to information in records under the control of **those institutions** 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.

Section 2(1) ["Full accountability" Purpose]

The proposal amends the purpose section to emphasize that the central purposes of the Act are to promote full accountability of government through transparency and to make government records fully accessible to individuals.

The use of the term "fully accountable" is inspired by the Nova Scotia **Freedom of Information and Protection of Privacy Act**, a formulation of words judicially considered by the Nova Scotia Court of Appeal (leave denied to the Supreme Court of Canada) in *O'Connor* v. *Nova Scotia (Priorities and Planning Secretariat)*, 2001 NSCA 132. Speaking for the court Saunders, J.A. noted that the N.S. legislation is unique, in Canada, in using the expression "fully accountable", and stated:

"I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public a greater right of access to information than might otherwise be contemplated in the other provinces and territories in Canada." (para. 57)

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

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: recommended no change to purpose clause (p. 18; Rec. 2-1)
ICSR: no reference
C-201: change to "The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution because it is the Government of Canada's obligation to release information that will assist Canadians in assessing the Government's management of the country and in monitoring the Government's compliance with the *Canadian Charter of Rights and Freedoms*."

(1.1) The right of access referred to in subsection (1) shall be provided in accordance with the following principles:
(a) the information should be available to Canadians without unreasonable barriers with respect to cost, time or rules of secrecy;
(b) the information should be available in the format most useful to the requester whenever the format exists or can be created at reasonable cost to the requester;
(c) necessary exceptions to the right of access should be limited and specific; and
(d) decisions on the disclosure of government information should be reviewed independently of government (s. 2)

MFP: no reference

Discussion paper: No comments

Similar provisions in other jurisdictions: *Nova Scotia Freedom of Information and Protection of Privacy Act* s. 2: “The purpose of this Act is (a) to ensure that public bodies are fully accountable to the public by (i) giving the public a right of access to records, (ii) giving individuals a right of access to, and a right of correction of, personal information about themselves, (iii) specifying limited exceptions to the rights of access, (iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and (v) providing for an independent review of decisions made pursuant to this Act;

2.(3) Every government institution shall make every reasonable effort to assist persons requesting access and to respond to each request openly, accurately and completely and without unreasonable delay.

Section 2(3) [Duty to Assist]

The Information Commissioner has referred to the "knowledge imbalance" between government institutions and requesters. Requesters are frequently not in a position to know the details of information held by government institutions and so they may be unable to properly formulate their requests for records. This new provision places an obligation on government institutions to facilitate access to information by assisting requesters. This change reflects the view that providing requested information is a public service. Both the Task Force and the Minister's Framework paper recommended that the Act be amended to include this duty, and many provincial access acts contain a duty to assist requesters.

(new provision)

O/S: no reference
S/A: no reference
IC93-94: "Government should be obliged to help the public gain access to its national information resource"; insert principles into the Act (p. 7)
IC00-01: same recommendation as IC93-94 (p. 65)
TF: Act should be amended "to require institutions to make a reasonable effort to assist applicants on request" and to contact requesters before refusing to process a request on the ground that it is frivolous and vexatious (p. 86; Rec. 5-21)
ICSR: criticize that applicants would have to request assistance, (p. 22); same as IC93-94 and IC00-01: insert principle into Act (above) (p. 56-57)
C-201: no reference
MFP: agrees with Task Force recommendation (p. 28)

Discussion Paper: No comments

Federal Accountability Act:

4(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested. (s.143, in force on 2007.09.01)

Similar provisions in other jurisdictions: Alberta, s. 10; British Columbia, s. 6; Manitoba, s. 9; Newfoundland, s. 9; Northwest Territories, s. 7; Yukon, s. 7; United Kingdom, s. 16

2.1 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.

Section 2.1 [Obligation to Create Records]

The right of access to information is not meaningful if records are not routinely created by public officials. The Information Commissioner's Response to the Task Force and the evidence before the Gomery Commission of Inquiry suggests that, too often, there is a practice of avoiding making records in order to avoid application of the Act and insulate officials from public accountability. Section 2.1 would require the creation of records reasonably necessary to document government decisions, advice, recommendations, and deliberations. A similar provision is found in United States federal law and in the government's management of government information (MGI) policy.

The MGI policy, adopted on May 1, 2003, is premised on the explicit recognition that "Information is a valuable asset that the Government of Canada must manage as a public trust on behalf of Canadians." One of the requirements of that management obligation is a specific obligation on government institutions to "document decisions and decision-making processes throughout the evolution of policies, programs and service delivery." Elsewhere in the MGI policy, the obligation to create records is restated as follows: "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." Finally, the MGI policy makes it explicit that: "All public service employees are responsible for documenting their activities and decisions."

(new provision)

O/S: no reference
S/A: no reference
IC93-94: "The *Archives Act* should be amended specifically to impose the duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures, and transactions."; "to this day, some officials have no hesitation in admitting, even advocating, that important matters simply be not written down or preserved." (p. 7, 3)
IC00-01: Information management legislation should impose a "duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures, and transactions". (p. 66)
TF: recommended the setting of standards for public officials concerning documentation of government business, but no legislative change (p. 146-148)
ICSR: the duty to create records is not being respected; there should be a legal obligation on all public officials to (i) document their business activities (decisions, actions, transactions, considerations), and (ii) ensure that those records are properly included in an institutional system of records (p. 30, 57)
C-201: no reference
MFP: no reference

Discussion Paper [p.34-37; 43]

- There are a number of statutory requirements for the public sector to create records in specific circumstances (For example: *Financial Administration Act, Employment Equity Act, Employment Insurance Act* and the Treasury Board policy on the Management of Government Information.)

- "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."

- "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."
- "Regarding sanctions, obviously, there must be a distinction between poor record keeping and intentional, bad (or even criminal) behaviour." "Also, 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."

- "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."

- "Although codifying the duty to document may not be necessary, the principle behind the proposal appears to be sound."

- Costs: seven million dollars annually

2.2 Every government institution shall maintain a public register containing a description of every record disclosed in response to a request made under this Act.

Section 2.2 [Public Register]

This provision requires that government institutions maintain a public register containing a description of all records that have been released under the Act. This 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.

(new provision)

O/S: no reference
S/A: will take steps to make lists of records that have been disclosed under the Act available to users to help them to identify the records they want (p. 34)
IC93-94: IC recommended that all government institutions be required to maintain a public register containing all records [not just a description of records as in the above provision] released under the Act (p. 8)
IC00-01: same as above (p. 66)
TF: government institutions should be encouraged to post summaries of released information, and hard copies of documents, in their reading rooms (p. 184, Rec. 7-4)
ICSR: same recommendation as IC93-94 and IC00-01 (p. 57)
C-201: no reference
MFP: no reference

NOTE: (Current s. 5 is a related provision: requires designated Minister to publish a description of the organization and responsibilities of each government institution, a description of all classes of records in sufficient detail to facilitate the exercise of the right of access; description of all manuals used by employees; title and address of appropriate officer to whom requests should be sent; bulletin published twice a year to keep info up-to-date.)

Discussion Paper [p.29-30]

- "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."

- A requirement for translation is an important consideration.

- "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."

- As an alternative, the current model used by National Defence (ND) could be expanded. 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."

2.3 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.

Section 2.3 [Public Interest Override]

This provision requires the disclosure of a requested record if the public interest in disclosure "clearly outweighs the need for secrecy". This clause ensures that important information will not be withheld in circumstances in which the public interest in disclosure predominates. Section 2.3 operates notwithstanding any other provision of the Act. The use of the word "clearly" will ensure that the override clause is used sparingly and will not undermine the Act's exemption provisions. As a result of the inclusion of s. 2.3, the public interest override clause in s. 20(6) of the Act has been deleted. Disclosure in the public interest is an important access to information issue and has become a feature of most modern access legislation in Canada.

(new provision)

O/S: recommended a provision requiring a government institution to reveal information as soon as practicable where there are grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard (p. 69)

S/A: recommended that public interest override be extended to all of s. 20 information (including trade secrets) (p. 42)

IC93-94: "The absence in the federal Act of a general public interest override is a serious omission which should be corrected." (p. 16)

IC00-01: recommended a general public interest override where disclosure is clearly in the public interest, subject only to the personal privacy exemption (p. 72)

TF: a general public interest override is not necessary, discretionary exemptions already imply a balancing of the public interest; a general override would not result in greater disclosure of information (p.42-43)

ICSR: recommended insertion of a "public interest override" provision, as recommended by the Standing Committee Report (O/S, above) (p. 64)

C-201: contains a public interest override, as follows, in s. 13: "The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in subsection (1) if that disclosure would be in the public interest as it relates to public health, public safety, protection of the environment or the governance of corporations and, if the public interest in disclosure clearly outweighs in importance any financial loss, prejudice to the competitive position of or any other injury referred to in this section to the Government of Canada or to a government institution or its officers or employees."

MFP: no reference

Discussion Paper [p.13, 24-25]

- Currently the public interest in disclosure is addressed on a case-by-case basis and only in connection with two exemptions in the ATIA. (sections 19(2)(c) and 20(6)

- As drafted, this proposed provision is very broadly worded.

- A public interest override as broad and as general as what the Information Commissioner is proposing is not without precedent in Canada. (i.e. British Columbia, Alberta, and Nova Scotia.) 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 has a provision on a public interest override that 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 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.”

- “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.”

Similar provisions in other jurisdictions: Canada: Alberta s. 32; British Columbia s. 25; Manitoba, Newfoundland s. 31; Nova Scotia s. 32; NWT (various sections), Ontario s. 23; PEI and Saskatchewan - various sections; Other countries : Antigua & Barbados; Australia – various sections; Azerbaijan; Bosnia Herzegovina; Dominican Republic; EEC – European Investment Bank draft law; Hong Kong s. 1.2, 2.2, 2.15; India; Israel; Kosovo; Macedonia; Moldova; New Zealand; South Africa; United Kingdom; United States – various

“government institution” means any department or ministry of state of the Government of Canada, **including the office of the head thereof,** listed in Schedule I or any body or office listed in Schedule I;

Section 3 [Definition of government institution]

This provision is included to clarify that the offices of ministers form part of the departments over which they preside. Consequently, records held in ministers’ offices, relating to departmental matters, will be subject to the reject of access; the personal and political records of ministers will not.

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"government institution" means any department or ministry of state of the Government
      of Canada listed in Schedule I or any body or office listed in Schedule I;
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O/S: no reference
S/A: no reference
IC93-94: the definition of “government institution” should be amended to include records located in a minister’s office, although records of personal or constituency affairs should not be disclosed (p. 17-18)
IC00-01: section 4 should explicitly state that it includes any records held in the Offices of Ministers which relate to matter falling within their duties as head of departments (p.57)
TF: recommended that the status of records in ministers’ offices be dealt with more explicitly in the Act (p. 34; Rec. 3-4)
ICSR: same as IC00-01 (p. 48)
C-201: adds definition of “officer or employee of a government institution” to include ministers and their staff; any body of office listed in Schedule I, a Crown corporation or wholly-owned subsidiary as defined in the Financial Administration Act, and any incorporated not-for-profit organization that receives at least two-thirds of its financing through federal government appropriations; amends Schedule I to include the following entities: Atomic Energy of Canada; Canada Post Corp.; CBC; Canadian Wheat Board; Export Development Canada; NAC Corp.; Office of the Auditor General; Office of the Chief Electoral Officer; Office of the Commissioner of Official Languages; Office of the Information Commissioner; Office of the Privacy Commissioner (s. 3)
MFP: notes that the IC is currently challenging the issue whether records in a minister’s office are subject to the Act, and recommends to await the outcome of that case, states that a minister’s office is distinct in its composition and functions from the relevant government institution (p. 16)

Discussion Paper [p.7-9]

The discussion paper submits some options:

1) To adopt the Information Commissioner's proposal and he would have access to review the personal and political records of Ministers to determine whether the ATIA would apply.

2) That the ATIA covers “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.”

3) “Extend coverage of the ATIA to all Members' offices, but not to Ministers' departmental offices, with an exclusion for personal and political records.” 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, giving the Information Commissioner access to all departmental records.

- It is possible that providing access to all records in the offices of Members would reduce the full and frank public political debate.

- "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. "

- "Whether the documents kept in a member's office would be covered by the ATIA would be a case by case determination, by 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."

- "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."

See also comments under section 77(2)

Federal Accountability Act

3. "government institution" means

(a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act; (s.141 (2), in force on 2007.09.01)

Schedule I: s.164 deletes from Schedule I the Crown Corporations and their wholly-owned subsidiaries since they will be included under the new definition in section 3 (in force on 2007.09.01)

3.01 (1) For greater certainty, any provision of this Act that applies to a government institution that is a parent Crown corporation applies to any of its wholly-owned subsidiaries within the meaning of section 83 of the Financial Administration Act.

(2) For greater certainty, the Canadian Race Relations Foundation and the Public Sector Pension Investment Board are parent Crown corporations for the purposes of this Act. (s. 142, in force)

"Open Government Coordinator" means the officer of a government institution designated under section 73 to fulfill the duty set out in section 73.1;

Section 3 [Definition of Open Government Coordinator]

The recognition of the Open Government Coordinator reflects not only the change in the name of the Act, but also the important role and function of Open Government Coordinators in the access to information regime. In his Response to the Task Force, the Information Commissioner noted that, despite the central and indispensable role of ATIP coordinators in the system, they are not even mentioned in the Act.

Amendments to sections 5(1)(d), 73, and 73.1 also reinforce the important role of the Open Government Coordinators.

(new definition)

O/S: recommended that the status of the Access/Privacy Coordinators should be entrenched in the Act (in s. 73); and "coordinators should be officials of senior rank, wherever possible" (p. xiv and 15);
S/A: nothing specific in Act, although recommended that coordinators have access to senior management to ensure the timely and efficient processing of access requests (p. 32)
IC93-94: no reference
IC00-01: recommended that coordinators be defined in the Act and that s. 73 be amended to set out the duties of the access to information coordinators (p. 62-64)
TF: recommends that the role, duties and responsibilities of coordinators be described in Policy and Guidelines; recommended that the Policy requires that they have ready access to deputy head and senior management. (p. 125-126, Rec. 7-10 to 7-12)
ICSR: same recommendation as in IC00-01 (p. 55)
C-201: no reference
MFP: no reference

Discussion Paper: No comments

"record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, **electronic communication**, and any other documentary material, regardless of physical form or characteristics, and any copy thereof;

Section 3 [Definition of Record]

This amendment to the definition of "record" renders it more comprehensive and current with available technology, such as email, text messaging, and personal communication device messages, by including the term "electronic communications".

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"record" includes any correspondence, memorandum, book, plan, map, drawing, diagram,
pictorial or graphic work, photograph, film, microform, sound recording, videotape,
machine readable record, and any other documentary material, regardless of physical
form or characteristics, and any copy thereof;
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O/S: no reference
S/A: no reference
IC93-94: definition of "record" should be amended to include electronic communications such as email, computer conferencing, and other computer-driven communications (p. 13)
IC00-01: right of access in s. 4 should explicitly state that it includes any records held in the offices of Ministers and the Prime Minister which relate to matters falling within the Ministers' or Primer Minister's duties as head of the departments over which they preside (p. 57)
TF: recommended that definition not be changed (p. 31, Rec. 3-1)
ICSR: same as IC93-94 (p. 61)
C-201: changed to include "recorded information, regardless of physical form or characteristics or the medium in which it is held, including material on which data is recorded or marked and that is capable of being read or understood by a person or a computer system or other means, electronic mail, electronic data interchange and computer conferencing, and a copy of any of these things;"
MFP: no reference

Discussion Paper: No comments

Federal Accountability Act:

3. "record" means any documentary material, regardless of medium or form; (s.141(1), in force)

"trade secret" means any information, including a formula, pattern, compilation, program, device, product, method, technique or process,

(a) that is used, or may be used, in business for any commercial advantage,

(b) that derives independent economic value, whether actual or potential, from not being generally known to the public or to other persons who can claim economic value from its disclosure or use,

(c) that is the subject of reasonable efforts to prevent it from becoming generally known to the public, and

(d) the disclosure of which would result in harm to the economic interests of a person or entity or in improper benefit to the economic interests of a person or entity.

Section 3 [Definition of Trade Secret]

There is currently no definition of "trade secret" found in the Act. The proposed definition follows the principles set out in the Federal Court jurisprudence and is based on the wording contained in the British Columbia freedom of information legislation.

(new definition)

O/S: recommended the following definition: "A secret, commercially valuable plan, formula, process or device, that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."(p. 26)

S/A: would consider adopting a definition of "trade secret" if definition is adopted in relation to the Criminal Code and provincial legislation (p.42-43)

IC93-94: no reference

IC00-01: no reference

TF: a narrow interpretation of "trade secret" has been defined in the jurisprudence, inserting a definition would be unnecessary (p. 60-61)

ICSR: no reference

C-201: no reference

MFP: no reference

Discussion Paper: No comments

4.(1) Subject to this Act, but notwithstanding any other Act of Parliament, **any** person has a right to and shall, on request, be given access to any record under the control of a government institution.

(2) repeal

Section 4 [Anyone may request records]

Subsection 4(1) is amended to extend the right of access to any person. In 1987, the Standing Committee on Justice called for this extension of the right of access. This amendment would bring Canada's Act in line with those of other western states such as the United States and the United Kingdom. Since anyone in the world may make access requests through a Canadian agent (and many do, especially in the immigration field), this change is not expected to significantly increase the number of access requests.

4.(1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is: (*a*) a Canadian citizen, or (*b*) a permanent resident within the meaning of the *Immigration Act*, has a right to and shall, on request, be given access to any record under the control of a government institution.

(2) The Governor in Council may, by order, extend the right to be given access to records under subsection (1) to include persons not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate

The *Access to Information Act* Extension Order, No. 1 extends the right of access in 4(1) to include "all individuals who are present in Canada but who are not Canadian citizens or permanent residents within the meaning of the *Immigration Act* and all corporations that are present in Canada." (April 13, 1989)

O/S: right of access should be extended to "any person, natural or legal" and extend the Act to corporations, non-profit associations, employee associations, and labour unions; it is "unnecessary and undesirable" to limit the Access and Privacy legislation, because individuals outside the country can easily obtain the services of a qualified individual to apply on their behalf (p. 11-12)

S/A: noted the above recommendation of the Standing Committee, but did not agree, recommending instead that the right of access be granted to individuals and to incorporated and unincorporated entities *in Canada*; noted also that there is a significant cost associated with a "universal right to access" (p. 33-34)

IC93-94: "government information should be accessible to all without unreasonable barriers of cost, time, format or rules of secrecy" [presumably this includes non-residents of Canada] (p. 7)

IC00-01: same recommendation as above (p. 65)

TF: noted that in 1989 the right of access was extended to include all individuals and incorporated entities present in the country [as per ss. 4(2) above]; the requirement that the requester be present in Canada probably cannot be sustained; recommended further discussion with departments likely to be affected regarding increased costs (p. 18-19; Rec. 1-2)

ICSR: same as IC93-94 (p. 56); further, the proposed expansion would have virtually no consequence because of the actual use of in-Canada agents (p.23)

C-201: no change to right of access

MFP: no reference

Discussion Paper [p.28-29]

- 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.

- Government organizations with an international component would be the most susceptible to a large volume increase of requests.

- “Canadian taxpayers fund the access system and would therefore fund the right of foreign requesters”; 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”.

- “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.”

- May result in the need to broaden the grounds for extending the time limits to accommodate situations where the requested records are located abroad and the expertise to review the records is in Canada.

- If the proposal for universal access is accepted, the *Privacy Act* must be similarly amended.

Similar provisions in other jurisdictions: United States Freedom of Information Act: information available to the public (5 U.S.C. §a), United Kingdom Freedom of Information Act (s. 1), Australia Freedom of Information Act (s. 10) right of access given to “every person” but purpose clause states that the purpose of the Act is to extend “as far as possible the right of the Australian community and, in particular, the citizens of the Territory, to access to information”

4.(4) Subject to this Act, access to a record shall be given in any reasonable format specified by the person making the request.

Section 4(4) [Right to choose format]

This new subsection gives to the requester the right to choose the format of the information, provided the choice is reasonable. Currently, the Act and regulations give little guidance on the matter of the format in which information is to be released. While paper copy remains the most commonly requested format, other formats should be available whenever they exist or could be created with a reasonable amount of effort and at reasonable cost. Without this amendment, government institutions could insist that a requester be given a large volume or records in paper form – at 20¢ per page – rather than on diskette, CD-Rom or on-line, at a minimal cost.

(new provision)

O/S: no reference
S/A: no reference
IC93-94: recommended that government information be available in the format most useful to the requester (p. 13)
IC00-01: (same as above) recommended that the right of access should include a right to receive information in the format most useful to the requester; other formats should be made available where they exist or may be created with a reasonable amount of effort and reasonable cost (p. 69)
TF: recommended that the *Regulations* be amended to provide the a requester may indicate a preferred format and that the information can be disclosed in that format if it already exists (p. 71, Rec. 5-1)
ICSR: access in a format of choice should not be limited where the requested format exists (p. 23); same as IC93-94 and IC00-01; the refusal of a government institution to give access in a particular format should be reviewable by the IC (p. 61-62)
C-201: insert in purpose clause: "the information should be available in the format most useful to the requesters whenever the format exists or can be created at a reasonable cost to the requester" (s. 2)
MFP: no reference

Discussion Paper [p.33-34]

- "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, they act in accordance with the preferences of the requesters.

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

Federal Accountability Act

4(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested. (s. 143, in force on 2007.09.01)

This comment also applies to section 12(1)

4.(5) The identity of a person making a request under subsection (1) may not be disclosed without the consent of the person unless

(a) the disclosure is solely within the government institution to which the request is made; and

(b) the person's identity is only disclosed to the extent that is reasonably necessary to process and answer the request.

Section 4(5) [Confidentiality of requester identity]

This addition to section 4 imposes upon officials fulfilling their duties under the Act an obligation to keep confidential the identities of requesters except to the extent required for the proper processing of access requests or, otherwise, with the requester's consent. This amendment addresses the concern that some requesters may receive slower or less forthcoming service if their identities are made known to senior officials in the department.

(new provision)

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

NOTE: In the IC's 1997-98 Annual Report, the IC recommended that coordinators be under a strict duty to keep confidential the identities of requesters, except to the extent required for the proper processing of the request, with the consent of the applicant (requester), or otherwise as permitted by the *Privacy Act*.

Discussion Paper: No comments

Federal Accountability Act

4(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested. (s. 143, in force on 2007.09.01)

This issue was studied at the Standing Committee on Access to Information, Privacy and Ethics (Report on November 22, 2006). The government tabled a response to that report on March 22, 2007

5.(1)(d) the title and address of the **Open Government Coordinator** for each government institution to whom requests for access to records under this Act should be sent.

Section 5(1)(d) [Open Government Coordinator]

This change updates the Act to reflect the position and role of the Open Government Coordinator for each government institution, and to direct access requesters to the official in charge of processing requests. [See also s. 3 - definition of Open Government Coordinator.]

5.(1) The designated Minister shall cause to be published, on a periodic basis not less frequently than once each year, a publication containing:

(*a*) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;

(*b*) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act;

(*c*) a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution; and

(*d*) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent.

See references from s. 3 [Definition of "Open Government Coordinator"]

Discussion Paper: No comments

9.(1)(a) repeal and substitute.

(a) meeting the original time limit would unreasonably interfere with the operations of the government institution and the request

(i) is for a large number of records,

(ii) necessitates a search through a large number of records, or

(iii) is part of a group of requests for a large number of records made by the same person on the same subject within a period of thirty days;

Section 9(1)(a) [Extending the 30-day response time for a large volume of records]

This amendment to s. 9(1)(a) allows a government institution to extend the time limit for responding to a request in a case where a requester makes a number of requests on the same subject matter within a 30-day period. This change allows a government institution faced with a number of related requests, none of which meet the "large volume" requirement, to consider them as one request for the purpose of claiming a time extension under paragraph 9(1)(a).

9.(1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if

(*a*) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,

(*b*) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or

(*c*) notice of the request is given pursuant to subsection 27(1) by giving notice of the extension and, in the circumstances set out in paragraph (*a*) or (*b*), the length of the extension, to the person who made the request within thirty days after the request is received, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

O/S: no reference

S/A: no reference, although delay issue discussed

IC93-94: no reference

IC00-01: recommended that the Act be changed as per our proposal - to permit a government institution to extend the time limit in respect of requests on the same subject matter received from one requester within a 30 day period (p. 60-61)

TF: recommended that s. 9(1)(a) be amended to simply permit a government institution an extension under s. 9 if "meeting the original time limit would unreasonably interfere with the operations of the government institution" (p. 75; Rec. 5-6)

ICSR: same as IC00-01 (p. 52-53); criticize the TF's recommendation to remove the large volume criteria for extending response times (p. 21)

C-201: adds 9(a.1): "the request is included among a large number of requests from the same person and meeting the original time limit would unreasonably interfere with the operations of the government institution (s. 6)

MFP: nothing specifically on large requests; reference to Task Force proposal to allow government institutions to aggregate requests made separately in order to avoid fees or time limit extensions; "government seeks views on these timing and process issues" (p. 27-28)

Discussion Paper [p. 30-31]

- “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.”

- “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.”

- 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. Extending the right of access to any person may result in the need to broaden the grounds for extending the time limits.

9.(1)(b) consultations **with other government institutions** are necessary to comply with the request and cannot reasonably be completed within the original time limit, or

Section 9(1)(b) [Extending the 30-day response time to allow for consultations]

The original provision states that the head of a government institution may extend the time limit set out in section 7 or subsection 8(1) if consultations are necessary to comply with the request and cannot reasonably be completed within the original time limit. The proposed change would insert the phrase "with other government institutions" after the word "consultations". The effect of this change is to reflect current practice that consultations may only be used as a reason for extending the time period to respond to a request when they are undertaken with other government institutions. This change would clarify that an extension of time may not be claimed for consultations between or among officials of the same government institution.

9.(1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if

(*a*) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,

(*b*) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or

(*c*) notice of the request is given pursuant to subsection 27(1) by giving notice of the extension and, in the circumstances set out in paragraph (*a*) or (*b*), the length of the extension, to the person who made the request within thirty days after the request is received, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper [p.31]

- This proposition "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…"

10.(3.1) Where the head of a government institution is deemed to have refused to give access under subsection (3), a notice thereof shall be given to the person who made the request and to the Information Commissioner.

Section 10(3.1) [Notification of deemed refusals]

Subsection 10(3.1) provides that, when there has been a deemed refusal under the Act, the head of the government institution must notify the requester and the Information Commissioner. The Task Force recognized that there is a serious problem with government institutions failing to meet deadlines. This provision would put the requester on notice that the deadline for responding to a request has passed, allowing him or her to engage the complaint procedure set out in the Act. Notice to the Information Commission would allow the Commissioner to monitor the frequency with which institutions are late in responding to access requests. The provision would encourage all participants in the process - the government institution, the requester, and the Information Commissioner - to monitor respect for the Act's deadlines.

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(new provision)
10(3) reads: Where the head of a government institution fails to give access to a
record requested under this Act or a part thereof within the time limits set out in
this Act, the head of the institution shall, for the purposes of this Act, be deemed
to have refused to give access.
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O/S: recommended that Act be amended to provide that where a government institution fails to provide access within the time limits set out in the Act, the requester should be notified of his right to complain to the IC (p. 67)
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: recommended the following change to the Access to Information Policy: where a government institution will be unable to respond within legislated timeframe, it must notify the requester (copy to the IC) and state the reason for the delay and the expected date of response (p. 76; Rec. 5-7)
ICSR: criticized the Task Force for recommending that the above be a policy change only, rather than a legislative change (p. 23-24)
C-201: no reference
MFP: no reference

Discussion Paper [p.31-32]

- "Many institutions already contact requesters informally when they are late."

- "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."

- "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.

11.(6) The head of a government institution to which a request for access to a record is made under this Act **shall** waive the requirement to pay a fee or other amount or a part thereof under this section o**r shall** refund a fee or other amount or a part thereof paid under this section, **if the request to which the fee or other amount relates is deemed to have been refused pursuant to subsection 10(3).**

Section 11(6) [No fees for late responses]

This subsection provides that, where a government institution fails to give access to a record within the time limits set out in the Act, the fee shall be waived. The rationale is that requesters should not have to pay any fees when a government institution fails to meet a deadline provided by the Act. The Task Force recommended that the timeliness of the response to the requester be considered as a factor in making the decision to waive access fees. This amendment would provide an incentive for the government institution to respond to requests in a timely fashion.

11.(6) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.

O/S: recommended that no fees be payable if a search does not reveal any records (p. 107)
S/A: no reference
IC93-94: recommended that institutions not be allowed to collect any fees where there is a deemed refusal, although this recommendation viewed as "largely symbolic" (p. 12)
IC00-01: reference to IC93-94 proposal, but no recommendation
TF: recommended that the *Access to Information Policy* contain fee-waiver criteria; one criterion is "the timeliness of the response to the requester" (p. 83, Rec. 5-16); for other waiver criteria, see s. 11(7)
ICSR: no specific reference to "no fees for late responses" (p. 59)
C-201: adds 11(7), which is similar to the above proposal, and reads: "Where the head of a government institution fails to give access to a record requested under this Act or a part thereof within the time limits set out in this Act, the head of the government institution shall be deemed to have waived the requirement to pay a fee or other amount or a part thereof under this section" (s. 7)
MFP: no reference

Discussion Paper [p.33]

- "The Access to Information Act does not, and was never intended to, operate on a cost recovery basis."

- Amendments to the Access to Information Act's fee structure would trigger the application of the User Fees Act. Accordingly, extensive consultations would be required with stakeholders.

- "The change would also trigger the introduction of a sliding scale for performance"; which can be confusing with a fee structure that would vary from institution to institution and from year to year.

- It "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, clear direction would be required to ensure that fees would be similarly applied.

- 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.

- Further, the Commissioner's proposal to aggregate requests for the purpose of invoking time extensions should be considered for the application of fees.

These comments also apply to section 11(7)

11.(7) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section and shall, in deciding whether or not to waive or refund a fee or other amount, take into account the following factors:

(a) whether the requested record has previously been disclosed under this Act;

(b) whether the requested record contains information relating to public health, public safety, consumer protection or protection of the environment;

(c) whether the requested record contains information relating to eligibility for a service, program or benefit; and

(d) whether the disclosure of the information would be in the public interest.

Section 11(7) [Fee waiver criteria]

This amendment to subsection 11(7) sets out four criteria to be taken into account in considering a request to waive fees. At present, government institutions may waive fees upon request, but there is no uniformity of approach to waiver decisions. The Task Force noted that many institutions do not record the reason for waiving fees, and consequently it is difficult to assess the fee structure and the fairness of past decisions to waive fees.

(new provision)

O/S: recommended that fee waiver criteria be inserted into the Act, as follows:
(1) whether there will be a benefit to a population group of some size, distinct from the benefit to the applicant
(2) whether there can be an objectively reasonable judgment by the applicant as to the academic or public policy value of the subject of the research in question
(3) whether information released meaningfully contributes to public development/understanding of subject
(4) whether information has already been made public, in reading room or other means
(5) whether applicant can show that the research effort is likely to be disseminated to the public
Fee waiver complaints to IC, who may make binding recommendation, w/o judicial review (p. 65-66)

S/A: states that the government will establish criteria for the waiver of fees - including whether the release of the record will benefit public health, safety or the protection of the environment; criteria to be set out in the Policy Guide (p. 44)

IC93-94: recommended that the fee waiver criteria mentioned by the Standing Committee (above; O/S) be inserted into Act; also consider the *Government Communications Policy* criteria: info needed by individuals to make use of public service/program; info required for public understanding of major new priority, law, policy, program or service; info explains the rights, entitlements, obligations of individuals; info informs public about dangers to health, safety, environment; whether payment will cause financial hardship (from Ontario act) (p. 9-10)

IC00-01: same as IC93-94 (p. 68)

TF: recommended that the *Access to Information Policy* contain fee-waiver criteria, as follows: degree to which release of info will serve public interest; financial hardship caused to the applicant; whether amount payable is less than expected cost of administering fee; timeliness of response to requester (p. 83, Rec. 5-16)

ICSR: same as IC93-94 (p. 59); criticize the TF's recommendation that fee-waiver criteria be a matter of policy rather than law (p.24)

C-201: inserts fee waiver criteria in 11(6), as follows:
(a) public benefit; (b) academic value to research; (c) release of info would contribute to current public debate of an issue of national importance; (d) info has already been made public; (e) requester demonstrates that research likely to be published or disseminated to public (s. 7)

MFP: no reference

Discussion Paper: See comments under section 11(6)

12.(1) A person who is given access to a record or a part thereof under this Act **may**, subject to the regulations, **choose to** examine the record or part thereof or to **receive** a copy thereof.

(2) Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language

(a) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or

(b) within a reasonable period of time, **if it is** in the public interest to cause a translation to be prepared.

(3) as is

(a) as is

(b) within a reasonable period of time, if **the giving of access in an alternative format** is necessary to enable the person to exercise the person's right of access under this Act and it is reasonable to cause that record or part thereof to be converted.

Section 12 [Right to choose whether to obtain a copy or examine a record]

This amendment to s. 12 is intended to codify existing practice which is that the requester has the right to choose whether to receive a copy or examine the record.

12.(1) A person who is given access to a record or a part thereof under this Act shall, subject to the regulations, be given an opportunity to examine the record or part thereof or be given a copy thereof.

(2) Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language (*a*) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or (*b*) within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared.

(3) Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given has a sensory disability and requests that access be given in an alternative format, a copy of the record or part thereof shall be given to the person in an alternative format (*a*) forthwith, if the record or part thereof already exists under the control of a government institution in an alternative format that is acceptable to that person; or (*b*) within a reasonable period of time, if the head of the government institution that has control of the record considers the giving of access in an alternative format to be necessary to enable the person to exercise the person's right of access under this Act and considers it reasonable to cause that record or part thereof to be converted.

O/S: coordinators should alert requesters to the right to inspect documents rather than purchase copies; records should be made available for inspection in regional offices (to save the requester money) (p. 64)
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference

ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper [p.33-34]

- “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, they act in accordance with the preferences of the requesters.”

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

Federal Accountability Act

4(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested. (s. 143, in force on 2007.09.01)

EXEMPTIONS GENERALLY

Sections 13 to 23 [Exemptions]

In 1987, the Standing Committee on Justice and Solicitor General, in **Open and Shut**, recommended that most exemptions in the Act be redrafted to contain an injury test and be discretionary in nature. This reliance on an injury test, and all exemptions being discretionary, (sometimes coupled with a public interest override) is echoed in the legislation in other jurisdictions such as Australia, New Zealand. The Information Commissioner has endorsed this view, but for section 19, as a sensible way to promote more open and accountable government. As well, it is proposed that all exemptions be subject to a general public interest override.

O/S: all exemptions (except Cabinet confidences) should be discretionary in nature and subject to a "significant injury" test (p. xiv)

S/A: Government "cannot agree with the Standing Committee's recommendation" (stated above) as implementation could harm unjustifiably those interest which must be protected; the injury test introduces uncertainty concerning the information that is or is not exempt; injury test would be time consuming and result in processing delays (p. 38)

IC93-94: exemptions should be discretionary in nature and contains an injury test, with the exception of s. 13 (confidences of other governments) and s. 19 (personal information) (p. 14-15)

IC00-01: move to discretionary, injury-based exemptions, with the exception of s. 13 and s. 19; but do not require "significant" injury (p. 71)

TF: mandatory exemptions should not be converted wholesale to discretionary exemptions, the reason for making them mandatory in the first place is still valid; there were no injury tests mentioned where they would be too vague to be used effectively; guidelines should be issued on how to apply discretionary exemptions. (p.42-44)

ICSR: move to discretionary, injury-based exemptions, with the exception of s. 13 and s. 19 (p. 62-64); TF's recommendations increase the level of secrecy; the pro-secrecy imbalance is staggering. The TF rejects past calls to rely on exemptions rather than exclusions where secrecy is justifiable. All of the proposed new exemptions and exclusions are either unnecessary or there is no evidence to justify the need for them. (p.12-14).

C-201: no significant changes (e.g. move to injury test); s. 69 changed to exemption

MFP: proposals to change existing exemptions are made in the Task Force Report and in the IC00-01: these proposals might be beneficial and should be considered (p. 17)

Discussion Paper [p.11-13; 25]

- "The hurdle for supporting an exemption in the course of a Court challenge has been high."

- "Class-based exemptions presuppose that the information is inherently sensitive and that an injury or prejudice would automatically flow from release."

- "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."

- "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 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.”

Similar provisions in other jurisdictions: Ontario, Québec and British Columbia do not qualify the extent/seriousness of the injury in their injury-tests.

Federal Accountability Act :

22.1 (1) The head of a government institution may refuse to disclose any record requested under this Act that contains a draft report of an internal audit of a government institution or any related audit working paper if the record came into existence less than fifteen years before the request was made.

(2) However, the head of a government institution shall not refuse under subsection (1) to disclose a draft report of an internal audit of a government institution if a final report of the audit has been published or if a final report of the audit is not delivered to the institution within two years after the day on which the audit was first commenced. (s.150, in force)

68.2 This Act does not apply to any information that is under the control of Atomic Energy of Canada Limited other than information that relates to

(a) its general administration; or

(b) its operation of any nuclear facility within the meaning of section 2 of the Nuclear Safety and Control Act that is subject to regulation by the Canadian Nuclear Safety Commission established under section 8 of that Act. (s.159, in force on 2007.09.01)

13.(1) Subject to subsection (2), the head of a government institution **may** refuse to disclose any record requested under this Act if

(a) the record contains information that was obtained in confidence from

(i) the government of a foreign state or an institution thereof;
(ii) an international organization of states or an institution thereof;
(iii) the government of a province or an institution thereof;
(iv) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government; or
(v) an aboriginal government; **and**

(b) disclosure of the information would be injurious to relations with the government, institution or organization.

(2) The head of a government institution **shall** disclose any record requested under this Act that contains information described in subsection (1) if the government, organization or institution from which the information was obtained

(a) consents to the disclosure; or

(b) makes the information public.

(3) The expression "aboriginal government" in **subparagraph (1)(e)(v)** means

(a) Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the Nisga'a Final Agreement Act; or

(b) the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the Westbank First Nation Self-Government Act, **or**

(c) any other aboriginal government listed in Schedule III.

Section 13 [Information obtained in confidence from other governments]

Subsection 13(1) has been amended to make it discretionary and subject to an injury test. On the other hand, subsection 13(2) has been amended to make disclosure mandatory if the information is otherwise public or if the providing government consents to disclosure.

The change proposed for subsection 13(3) is to facilitate the addition of future aboriginal governments. The Minister's Framework Paper recommended a similar change.

13.(1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from

(*a*) the government of a foreign state or an institution thereof;

(*b*) an international organization of states or an institution thereof;

(*c*) the government of a province or an institution thereof;

(*d*) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government; or

(e) an aboriginal government.

(2) The head of a government institution may disclose any record requested under this Act that contains information described in subsection (1) if the government, organization or institution from which the information was obtained

(a) consents to the disclosure; or

(*b*) makes the information public.

(3) The expression "aboriginal government" in paragraph 1(3) means

(a) Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the Nisga'a Final Agreement Act; or

(b) the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the Westbank First Nation Self-Government Act

O/S: recommended redrafting s. 13 to allow for a discretionary, injury test, rather than a class exemption; but the governments should have rights of notification and review similar to those accorded to third parties; recommended giving institutions of native self-government protection; recommended that component parts of foreign states be considered foreign governments (p. 21-22)
"The Committee is very concerned about a situation in which harmless records are being withheld under statues designed to promote disclosure." (p. 19)

S/A: willingness of other governments to share information with Canada would likely be adversely affected [by the change to an injury-based test]; it is doubtful that offering other governments the ability to argue in court over potential injury would been seen as providing sufficient protection; current level of protection should remain; component parts of foreign states and new institutions of native self-government should be protected, as recommended by the Committee (p. 39)

IC93-94: recommended to study the implications of moving to an injury-based test for s. 13; recommended extending (clarifying) protection to component parts of foreign states and to native self-governments; discretionary, injury-based test should apply to provincial, municipal, and native self-government information, with a 15-year time limit and a public interest override applying (p. 15)

IC00-01: recommended that s. 13 be re-written as a discretionary, injury-based exemption, with a time-limit of 15 years applying to all such confidences, unless the info relates to law enforcement or intelligence matters or is subject to international agreements; public interest override should apply to this exemption; recommended that protection be extended to cover component parts of foreign states and native self-governments (p. 72);

TF: not convinced that move to discretionary, injury-based provision would be beneficial; would likely set Canada apart from its allies and affect other governments' willingness to share information; recommended amendment to clarify that "foreign state" includes political subdivisions (p. 51-52; Rec. 4-12)

ICSR: same recommendation as IC00-01 (p. 64)

C-201: adds "or of a subdivision of a foreign state, or any institution of that government" to "government of a foreign state", as previously recommended; new (4) requires that a government institution attempt to seek consent of the foreign state to disclosure of correspondence where the portion originating from the government institution is made public; new (5) gives discretion to disclose records containing 30-year old correspondence described in (4), unless disclosure could reasonably be expected to threaten safety or health or individuals/be injurious to constitutional integrity of Canada, defence of Canada or detection of subversive activities.

MFP: could be amended to include subdivisions of foreign states and foreign authorities with which Canada has international/commercial relations; "aboriginal self-government" should be

amended to include a Schedule III, which would list qualifying aboriginal governments (p. 17)

Discussion Paper [p.14, 25-26]

- “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.”

- “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.”

- It “would set Canada apart from its key partners and would likely have a negative effect on other governments' willingness to share information with Canada.”

<u>Proposals submitted to the Committee:</u>

- “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;” [see section 77(1)(i)]

14. The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs, including, without restricting the generality of the foregoing, any such information

(*a*) on federal-provincial consultations or deliberations; or

(*b*) on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial **negotiations**.

Section 14 [Federal-Provincial matters]

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

14. The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs, including, without restricting the generality of the foregoing, any such information (*a*) on federal-provincial consultations or deliberations; or (*b*) on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial affairs.

O/S: recommended that the term "affairs" be replaced by the term "negotiations" (p. 22)
S/A: will consider the committee's recommendation (p. 37-38)
IC93-94: recommend that the word "affairs" be replaced by the word "negotiations" (p. 24)
IC00-01: replace word "affairs" with "negotiations" (p. 72)
TF: no reference
ICSR: recommended move to injury test; recommended replacing word "affairs" with "negotiations" (p. 63-64)
C-201: word "affairs" replaced with "relations"
MFP: no reference

Discussion Paper [p.26]

Proposal submitted to the Committee:

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

16.(1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) repeal

(*b)* repeal

(*a*) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,
(ii) that would reveal the identity of a confidential source of information, or
(iii) that was obtained or prepared in the course of an investigation; or

(*b*) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

Section 16 [Investigations and law enforcement]

It is proposed that paragraphs (1) (a) and (b) be repealed in order to give effect to the approach that exemptions should be discretionary with an injury test. Sensitive law enforcement and investigative information would be protected by 16(1)(c).

More than two decades of experience has shown no compelling need for the 20-year period (in the current paragraph 16(1)(a)) during which secrecy may be maintained without any need to demonstrate an injury from disclosure. These changes will bring the federal Act into line with the law enforcement provisions in Ontario, British Columbia and Alberta. Additionally, Manitoba, Nova Scotia, the Northwest Territories, Nunavut, Newfoundland and Labrador, Prince Edward Island, Québec and Saskatchewan have built in a harms test to part of their provisions on law enforcement.

With respect to subsection 16(3), this provision is redundant as there are no longer any such confidentiality agreements and, if there were, they could be protected upon meeting the test for exemption proposed for section 13.

16.(1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(*a*) information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to
(i) the detection, prevention or suppression of crime,
(ii) the enforcement of any law of Canada or a province, or
(iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,

if the record came into existence less than twenty years prior to the request;

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

(*c*) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information
(i) relating to the existence or nature of a particular investigation,
(ii) that would reveal the identity of a confidential source of information, or
(iii) that was obtained or prepared in the course of an investigation; or

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

(2) The head of a government institution may refuse to disclose any record requested under this Act that contains information that could reasonably be expected to facilitate the commission of an offence, including, without restricting the generality of the foregoing, any such information

(*a*) on criminal methods or techniques;

(*b*) that is technical information relating to weapons or potential weapons; or

(*c*) on the vulnerability of particular buildings or other structures or systems, including computer or communication systems, or methods employed to protect such buildings or other structures or systems.

(3) The head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or municipality pursuant to an arrangement made under section 20 of the *Royal Canadian Mounted Police Act*, where the Government of Canada has, on the request of the province or municipality agreed not to disclose such information.

(4) For the purposes of paragraphs (1)(*b*) and (*c*), "investigation" means an investigation that

(*a*) pertains to the administration or enforcement of an Act of Parliament;

(*b*) is authorized by or pursuant to an Act of Parliament; or

(*c*) is within a class of investigations specified in the regulations.

O/S: no reference
S/A: no reference
IC93-94: recommended repeal of (1)(a) and (b), keep injury test found in (1)(c); eliminate “20-year grace period” found in (1)(a) (p. 18)
IC00-01: same recommendation as IC93-04 (p. 73)
TF: original policy rationale for 16(1)(a) - broad protection for law enforcement information - remains; move to an injury test would require additional time/energy to interpret; maintain status quo; criteria for identifying investigative bodies under 16(1)(a) should be stated in the *Regulations*; amend s. 16(1)(c) to include information the disclosure of which could reasonably be expected to harm foreseeable, as well as current, investigations (p. 54-55; Rec. 4-13, 4-14)
ICSR: same recommendation as IC00-01; “there can be no justification for secrecy unless a reasonable expectation of injury to an important interest can be demonstrated”; 20-year grace period should be eliminated (p. 65)
C-201: amendment to (3): change to discretionary exemption; add (b) as additional condition: (a) Government of Canada has, at the request of the province or municipality, agreed not to disclose info, and (b) same information would not be accessible under provincial legislation if it were under the control of the province or municipality (s. 11)
MFP: no reference

Discussion Paper [p.15-16]

- “By deleting paragraphs 16(1)(a) and (b), which are discretionary class exemptions, s. 16 would contain only discretionary injury-based exemptions.” “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, “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.”

16.(3) An officer or agent of Parliament listed in Schedule II shall refuse to disclose any record requested under this Act that contains information obtained from another government institution in the course of a lawful investigation.

Section 16(3) [Exemption for Officers of Parliament]

It is proposed that Officers of Parliament will be covered by the Act. Since these agents conduct investigations and audits of other government institutions, they receive records from other institutions. It would not be appropriate for Officers of Parliament to make disclosure decisions about records they obtain from the institutions under investigation or audit. The purpose of this amendment is, thus, to ensure that government institutions do not hesitate to, or resist, providing records to Officers of Parliament and to ensure that access requests received by Officers of Parliament (for records provided by others) are dealt with by the government institution best equipped to know the import of the records and the consequences of release.

(new provision)

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: recommended that the Act exclude records relating to the exercise of a parliamentary officer's audit or investigation functions, or other government institutions' records under the custody of a parliamentary officer strictly for the purposes of an audit or investigation (p. 28, Rec. 2-6)

ICSR: no reference
C-201: no reference
MFP: requested Committee's views on whether and how parliamentary institutions should be subject to the Act and what special protections they would need if they were covered (p. 9)

Discussion Paper [p.25]

- It is suggested that the public interest override should not undermine the mandatory exemptions in the public interest (that is, mandatory exemptions provided to Agents of Parliament in the proposed Federal Accountability Act).

Federal Accountability Act

16.1 (1) The following heads of government institutions shall refuse to disclose any record requested under this Act that contains information that was obtained or created by them or on their behalf in the course of an investigation, examination or audit conducted by them or under their authority:
(a) the Auditor General of Canada;
(b) the Commissioner of Official Languages for Canada;
(c) the Information Commissioner; and
(d) the Privacy Commissioner.

(2) However, the head of a government institution referred to in paragraph (1)(c) or (d) shall not refuse under subsection (1) to disclose any record that contains information that was created by or on behalf of the head of the government institution in the course of an investigation or audit conducted by or under the authority of the head of the government institution once the investigation or audit and all related proceedings, if any, are finally concluded. (s. 144, in force)

16.2 (1) The Commissioner of Lobbying shall refuse to disclose any record requested under this Act that contains information that was obtained or created by the Commissioner or on the Commissioner's behalf in the course of an investigation conducted by or under the authority of the Commissioner.

(2) However, the Commissioner shall not refuse under subsection (1) to disclose any record that contains information that was created by the Commissioner or on the Commissioner's behalf in the course of an investigation conducted by, or under the authority of, the Commissioner once the investigation and all related proceedings, if any, are finally concluded. (s. 89, not in force)

16.3 Subject to section 541 of the Canada Elections Act, the Chief Electoral Officer may refuse to disclose any record requested under this Act that contains information that was obtained or created by or on behalf of a person who conducts an investigation, examination or review in the performance of their functions under the Canada Elections Act. (s. 145, in force)

16.4 (1) The Public Sector Integrity Commissioner shall refuse to disclose any record requested under this Act that contains information

(a) obtained or created by him or her or on his or her behalf in the course of an investigation into a disclosure made under the Public Servants Disclosure Protection Act or an investigation commenced under section 33 of that Act; or

(b) received by a conciliator in the course of attempting to reach a settlement of a complaint filed under subsection 19.1(1) of that Act.

(2) Subsection (1) does not apply in respect of a record that contains information referred to in paragraph (1)(b) if the person who gave the information to the conciliator consents to the record being disclosed. (s. 221, in force)

16.5 The head of a government institution shall refuse to disclose any record requested under this Act that contains information created for the purpose of making a disclosure under the Public Servants Disclosure Protection Act or in the course of an investigation into a disclosure under that Act. (s. 221, in force)

16.(4) The head of the Canadian Broadcasting Corporation may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the integrity or independence of the institution's newsgathering or programming activities.

Section 16(4) [Exemption for CBC]

It is proposed that the CBC be covered by the Act as a Crown Corporation. Since first proposed, in Open & Shut (1986), it has been recognized that the CBC's newsgathering and programming activities would require special protection in order to protect their integrity and independence.

(new provision)

O/S: Recommended that the CBC be covered by the Act, and that its program material be exempt (p.xiv, 10-11, 100)
S/A: no reference
IC93-94: Recommended that Act be extended to all federal government institutions, including special operating agencies, Crown corporations and wholly-owned subsidiaries, etc.; special provisions should exclude from coverage the program material of the CBC (p. 26-27)
IC00-01: recommended that the CBC be covered by the Act (p. 56)
TF: recommended that the criteria for inclusion in Schedule I be set out [see 77(2)]; recommended that the Act not apply to information relating to critical interests of organizations already or to be covered by the Act, e.g. CBC program material (p. 24-25, Rec. 2-1 - 2-3)
ICSR: add CBC to Schedule I (p. 47)
C-201: no reference
MFP: bring CBC into Schedule I, according to specific criteria, add provision excluding journalistic sources and program material of CBC, as has been done in the United Kingdom and Australia; this would also be consistent with PIPED Act, which currently applies to the CBC (p. 5-7)

Discussion Paper [p.6]

- "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."

Federal Accountability Act

68.1 This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration. (S. 159, in force on 2007.09.01)

16.(5) For the purposes of paragraph (1)(**a**) **and subsection (3),** "investigation" means an investigation **or audit that**

(*a*) pertains to the administration or enforcement of an Act of Parliament;

(*b*) is authorized by or pursuant to an Act of Parliament; or

(*c*) is within a class of investigations **or audits** specified in the regulations.

Section 16(5) [Definition of investigation]

This provision is amended to make clear that an audit falls within the definition of investigation for the purposes of section 16.

(new provision)

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper [p.26]

Proposal submitted to the Committee:

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

17. The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to threaten the safety **or mental or physical health** of individuals, **or that could reasonably be expected to increase the risk of extinction of an endangered species or increase the risk of damage to a sensitive ecological or historic site**.

Section 17 [Safety of individuals]

Although this is a rarely used exemption, there is broad agreement that it should be amended to make it explicit that this exemption also applies if disclosure could reasonably be expected to pose a threat to an individual's mental or physical health. The UK Act has a similar provision, as does Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, the Northwest Territories, Nunavut, Prince Edward Island, Saskatchewan. The addition of protection for records involving endangered species and sensitive ecological or historic sites was found in the Bryden and Martin private members' bills and are worthy of protection.

17. The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals.

O/S: no reference
S/A: no reference
IC93-94: recommended adding the threat to an individual's mental or physical health (p. 19) as per our proposal
IC00-01: same recommendation as IC93-94
TF: recommended amendment to add protection of "mental and physical health", as well as to permit non-disclosure that "would offend human dignity"; the latter change is designed to protect records such as photographs of violent crimes where the victim is dead for more than 20 years (p. 56, Rec. 4-16)
ICSR: same recommendation as IC93-94 (p. 65)
C-201: amended to protect mental or physical health of individuals, as well as "or which could increase the risk of extinction of an endangered species or increase the risk of damage to a sensitive ecological or historic site." (s. 12)
MFP: suggests extending s. 17 to include "mental and physical health of individuals" and "that would offend the dignity of any individual (see TF re: crime photographs) (p. 17-18); would consider adding a discretionary, injury-based exemption to protect anthropological, cultural and heritage sites, and endangered species (p. 22-23)

Discussion Paper [p.26]

Proposals submitted to the Committee:

- "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;"

18. The head of a government institution may refuse to disclose any record requested under this Act that contains

(*a*) trade secrets of a government institution;

(*b*) information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution **or to interfere with contractual or other negotiations of a government institution**;

(*c*) scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer or employee of priority of publication; or

(*d*) information the disclosure of which could reasonably be expected to be materially injurious to the financial interests of **a government institution** or the ability of the Government of Canada to manage the economy of Canada or could reasonably be expected to result in an undue benefit to any person, including, without restricting the generality of the foregoing, any such information relating to

(i) the currency, coinage or legal tender of Canada,
(ii) a contemplated change in the rate of bank interest or in government borrowing,
(iii) a contemplated change in tariff rates, taxes, duties or any other revenue source,
(iv) a contemplated change in the conditions of operation of financial institutions,
(v) a contemplated sale or purchase of securities or of foreign or Canadian currency, or
(vi) a contemplated sale or acquisition of land or property.

Section 18 [Canada's economic interests]

It is proposed that paragraph 18(a) be amended to correspond with paragraph 20(1)(a), which relates to the economic interests of third parties. The remainder of the content of the existing 18(a) is already captured by paragraph 18(d).

With respect to paragraph 18(b), the addition of the words, "or to interfere with contractual or other negotiations of a government institution" is meant to protect the interests of government institutions that engage in competitive business activities (such as Canada Post Corp), so as to put them on an equal footing with the protection given to third parties under section 20 of the Act.

18. The head of a government institution may refuse to disclose any record requested under this Act that contains

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

(*b*) information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution;

(*c*) scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer or employee of priority of publication; or

(*d*) information the disclosure of which could reasonably be expected to be materially injurious to the financial interests of the Government of Canada or the ability of the Government of Canada to manage the economy of Canada or could reasonably be expected to result in an undue benefit to any person, including, without restricting the generality of the foregoing, any such information relating to

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(i) the currency, coinage or legal tender of Canada,
(ii) a contemplated change in the rate of bank interest or in government
   borrowing,
(iii) a contemplated change in tariff rates, taxes, duties or any other revenue
   source,
(iv) a contemplated change in the conditions of operation of financial
   institutions,
(v) a contemplated sale or purchase of securities or of foreign or Canadian
   currency, or
(vi) a contemplated sale or acquisition of land or property.
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O/S: recommended the addition of a provision that provides for the disclosure of product or environmental testing carried out by the Government of Canada on federal institutions; currently, testing carried out by the Government of Canada on private sector products is disclosible under the Act; Government should not have broader right of non-disclosure than third parties (p. 26-27)

S/A: Government will make amendments to facilitate access to the results of product or environmental testing done by the government in respect of its own activities (p. 42)

IC93-94: recommended amending to include: health & safety override; in (1)(a) inserting term "substantial monetary value" in place of "substantial value"; amending to give protection to "special operating agencies" (SOAs) that compete in the private sector; exclude government databases from information having "substantial value" (p. 19)

IC00-01: same recommendations as IC93-94

TF: recommended change to "substantial monetary value" in (1)(a); amend (1)(b) to include prejudice to "part of" a government institution (to protect SOAs); include a provision specifying that the exemption does not extend to the results of product and environmental testing (p. 57-58, Rec. 4-17, 4-18, 4-19)

ICSR: recommended amending the provision in parallel with s. 20 regarding the release of the results of product and environmental testing; add term "substantial monetary value" in (1)(a); deal with concerns of SOAs competing in private sector (p. 65-66)

C-201: adds term "substantial monetary value" in (1)(a) and requires that the disclosure could reasonably be expected to be materially injurious to the financial interests of the Government of Canada; adds public interest override if disclosure would be in the public interest as it relates to public health, public safety, protection of the environment or the governance of corporations and if the disclosure clearly outweighs any financial loss or prejudice to the competitive position of the government (s. 13)

MFP: amend 18(b) to apply to SOAs; government would consider amending provision to require government institutions to disclose results of product or environmental testing done on behalf of a government institution

Discussion Paper [p.16, 26]

- "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."

<u>Proposals submitted to the Committee:</u>

- "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;"

Federal Accountability Act

18 (b) information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution or to interfere with contractual or other negotiations of a government institution;

18 (d) information the disclosure of which could reasonably be expected to be materially injurious to the financial interests of a government institution or to the ability of the Government of Canada to manage the economy of Canada or could reasonably be expected to result in an undue benefit to any person, including such information that relates to (S. 146, in force)

18.1 (1) The head of a government institution may refuse to disclose a record requested under this Act that contains trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential by,

(a) the Canada Post Corporation;

(b) Export Development Canada;

(c) the Public Sector Pension Investment Board; or

(d) VIA Rail Canada Inc.

(2) However, the head of a government institution shall not refuse under subsection (1) to disclose a part of a record that contains information that relates to

(a) the general administration of an institution referred to in any of paragraphs (1)(a) to (d); or

(b) any activity of the Canada Post Corporation that is fully funded out of moneys appropriated by Parliament. (s. 147, in force on 2007.09.01).

20.**(1)** Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(*a*) trade secrets of a third party;

(*b*) **Repealed**

(***b***) 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

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

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a **record or a part thereof if that record or part contains**

(*a*) the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee; **or**

***(b*) details of a contract or a bid for a contract with a government institution.**

Section 20 [Economic interests of third parties]

It is proposed that paragraph 20(1)(b) be repealed as paragraph 20(1)(c) is fully adequate to ensure that any legitimate business need for secrecy is served.

The proposed paragraph 20(2)(b) will ensure transparency in the government contracting process. As matters stand now, only partial glimpses are possible. There may be partial disclosure of winning bids and none at all of losing bids. Contract prices may be released without details. Other exemptions in the Act will ensure that sensitive aspects of contracts are protected.

A particularly unsatisfactory aspect of section 20 is the public interest override contained in subsection (6). It is essential, of course, that there be a public interest override, but it does not make sense to limit it to matters of "public health, public safety or the protection of the environment."

It is proposed that subsection 20(b) be deleted in favour of the general public interest override found in proposed section 2.3.

20.(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(*a*) trade secrets of a third party;

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

(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.

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

(3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the same time as the record or part thereof is disclosed provide the person who requested the record with a written explanation of the methods used in conducting the tests.

(4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(*b*), (*c*) or (*d*) 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.

O/S: recommended that the public interest override in (6) be extended to cover all s. 20 information (p. 102)

S/A: no reference

IC93-94: recommended that the Act provide for disclosure of details of bids for government contracts; abolish (1)(b) and (1)(a) as (1)(c) is adequate to address concerns about prejudice to a company; expand (6) override or establish general public interest override; allow for non-individualized third party notice where reasonable (p. 20-21)

IC00-01: same as IC93-94 (p. 74-76)

TF: a narrow interpretation of "trade secret" has been defined in the jurisprudence, inserting a definition would be unnecessary; enlarge public interest override to include consumer protection as an element of the public interest to be considered (p. 60-61, Rec. 4-21); allow for non-individualized notice to third parties where there is a large number of third parties to notify [see new s. 72.1]

ICSR: same as IC93-94 (p. 66-67); proposed change to (6) is timid (p. 12-13)

C-201: adds (b.1) "information relating to critical infrastructure"; adds (7) which provides for the disclosure of a record that is a "contract to which a government institution is a party or that is a bid for such a contract." (s. 15)

MFP: provision is basically sound; the IC and TF have both recommended that the s. 20 override provision be broadened and the government agrees with this recommendation; the C-201 amendment [b.1] would address concerns about a third party's critical infrastructure vulnerabilities (p. 18-19)

Discussion Paper [p.17-18; 26]

- "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."

- "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."

- Concerning section 20(2)(b), 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 "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."

- "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."

Proposals submitted to the Committee:

- "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);"

The discussion paper suggests extending current exemption in s. 20 for critical infrastructure information, this suggestion was not included in OGA [Discussion Paper: p.27]

- "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."

A Bill to this effect (C-12: *An act to provide for emergency management and to amend and repeal certain Acts*) is currently before a Senate Committee (Special Senate Committee on the Anti-Terrorism Act)

Federal Accountability Act:

20.1 The head of the Public Sector Pension Investment Board shall refuse to disclose a record requested under this Act that contains advice or information relating to investment that the Board has obtained in confidence from a third party if the Board has consistently treated the advice or information as confidential.

20.2 The head of the Canada Pension Plan Investment Board shall refuse to disclose a record requested under this Act that contains advice or information relating to investment that the Board has obtained in confidence from a third party if the Board has consistently treated the advice or information as confidential.

20.3 The head of the National Arts Centre Corporation shall refuse to disclose a record requested under this Act if the disclosure would reveal the terms of a contract for the services of a performing artist or the identity of a donor who has made a donation in confidence and if the Corporation has consistently treated the information as confidential. (s.147, in force on 2007.09.01)

21. (1) Subject to subsection (2), the head of a government institution may refuse to disclose any record requested under this Act that **came into existence less than five years prior to the request if the record** contains

(a) advice or recommendations developed by or for a government institution or a minister of the Crown **and disclosure of the record could reasonably be expected to be injurious to the advice-giving process of the government institution;**

(b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown **and disclosure of the record could reasonably be expected to be injurious to the internal decision-making process of the government; or**

(c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto **and disclosure of the record could reasonably be expected to be injurious to the conduct of the negotiations.**

(2) Subsection (1) does not apply in respect of a record that contains

(a) any factual material,

(b) the results of a public opinion poll, survey or focus group,

(c) a statistical survey,

(d) an appraisal, or a report by an appraiser, whether or not the appraiser is an officer or employee of the government institution;

(e) an economic forecast,

(f) an environmental impact statement or similar information,

(g) a final report, final study or final audit on the performance or efficiency of a government institution or on any of its programs or policies,

(h) a consumer test report or a report of a test carried out on a product to assess equipment of the government institution;

(i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the government institution,

(j) a report on the results of field research undertaken before a policy proposal is formulated,

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a government institution,

(l) a plan or proposal of a government institution to establish a new program or to change a program, or that relates to the management of personnel or the administration of the institution, if the plan or proposal has been approved or rejected by the head of the institution;

(m) information that the head of the government institution has cited publicly as the basis for making a decision or formulating a policy;

(n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the person making the request, or

(o) a report or advice prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the Crown.

(3) For the purpose of this section, "advice" is an opinion, proposal or reasoned analysis offered, implicitly or explicitly, as to action.

(2) [Repealed due to inclusion in (n) and (o)]

Section 21 [Advice & recommendations]

The exemption for advice and recommendations is one of the most controversial provisions of the Act as its broad language which can be made to cover – and remove from access – wide swaths of government information. Court decisions have further broadened the exemption. The Standing Committee on Justice and Solicitor General, in 1986 state that the exemption "has the greatest potential for routine misuse".

The Standing Committee, 1987, recommended an injury test that would acknowledge the need for candour in the decision-making process. While the Committee's recommendation was a good one, subsequent experience in Ontario, Manitoba, Newfoundland and Labrador, the Northwest Territories, Nunavut, British Columbia, the Yukon, Saskatchewan and Prince Edward Island shows that more is required. Each of those jurisdictions has a long list of types of information not covered by the exemption.

Further, in the Commissioner's Special Report to Parliament in 2002, he recommended defining the word "advice" for the purposes of this section.

The proposed amendments deal with all of these issues and are patterned on the Ontario legislation.

21.(1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(*a*) advice or recommendations developed by or for a government institution or a minister of the Crown,

(*b*) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown,

(*c*) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or

(*d*) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,
if the record came into existence less than twenty years prior to the request.

(2) Subsection (1) does not apply in respect of a record that contains

(*a*) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or

(*b*) a report prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the Crown.

O/S: recommended amendment to contain an injury test; clarify that it applies solely to policy advice and minutes at the political level of decision making, not factual information used in the routine decision-making process; exemption should only apply to records that came into existence less than 10 years prior to the request (a 20-year limitation period is too long, whereas 10 is better as it represents the maximum duration of two Parliaments); many groups took the position that the language of s. 21 was too broad; (p. 28-29)

S/A: recommended that the period to which the exemption applies should be 20 years, to preserve the convention of ministerial responsibility and the attendant confidential relationship between Ministers and public servants. (p. 40-41)

IC93-94: recommended amendment to include an injury test; to protect policy advice and minutes at the senior level, not factual information used in routine decision-making; reduce time limitation to 10 years; specify types of information not covered by the exemption; define “advice” includes plans devised but never approved available to the public; provision be subject to public interest override (p. 21-22)

IC00-01: agreed with O/S recommendations (above); same as IC93-94; Ontario and B.C. statutes list types of information not included in the exemption: this should be emulated; amend Act to prohibit reliance on s. 21 for late responses (p. 76-77, 61)

TF: recommended amending the provision to state that the exemption does not apply to: factual material that in itself does not reflect the nature or content of advice; public opinion polls; statistical surveys; final reports on the performance or efficiency of a government institution; final reports of task forces, etc; appraisals; economic forecasts; result of field research; information that the head of a government institution has cited publicly as the basis for making a decision; substantive rules or statements of government policy adopted for the purpose of interpreting an act or regulation; changing the protection period to 10 years; amend to protect personnel management or administrative plans that have not been approved or rejected for no more than 5 years from the date of rejection; repeal (2)(b) to allow for protection of consultants’ work (p. 48-50, Rec. 4-8, 4-9, 4-10, 4-11)

ICSR: same as IC93-94; amend 21(1)(d) to permit disclosure of plans devised but never approved (p. 68-69); the proposal to sweep contractor’s report into that exception is a threat to the right of access (p. 13)

C-201: amends (1)(a) to exclude “public opinion surveys” and (1)(b) to “officers or employees of a government institution”; amends (1)(d) to insert injury test (s. 16)

MFP: provision should be narrowed to codify recent case law that states that advice does not include factual information; government is considering amending (1)(d) to provide only a 5 year protection period for plans in respect of which no decision is taken; also consultants’ advice should be included in the exemption (p. 19-20)

Discussion Paper [p.19-20;26-27]

- “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.”

- For the proposal to reduce the timeframe we should consider whether reducing the protective period 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. [(2001) 14 C.P.R. 449 FCA]

- “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.”

Proposals submitted to the Committee:

- “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.);”

- “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.”

Federal Accountability Act

21(1)(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate;

21(2)(b) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared; (s.149, in force)

23. The head of a government institution may refuse to disclose any record requested under this Act **if**

(a) the record contains information that is subject to solicitor-client privilege; and

(b) disclosure of the information could reasonably be expected to be injurious to the interests of the Crown.

Section 23 [Solicitor-client privilege]

It has been obvious over the past 22 years that the application and interpretation of section 23 by the government (read – Justice Department) is unsatisfactory. Most legal opinions, however old and stale, general or uncontroversial, are jealously kept secret. Tax dollars are used to produce these legal opinions and, unless an injury to the interests of the Crown can reasonably be expected to result from disclosure, legal opinions should be disclosed.

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

O/S: amend to clarify that the solicitor-client exemption is only available where litigation or negotiations are underway or are reasonably foreseeable (p. 29)

S/A: no reference

IC93-94: amend to include injury test; make clear that severance of some portions of a record does not result in loss of privilege on other portions of the record (p. 22-23)

IC00-01: same as IC93-94 (p. 77); amend Act to prohibit reliance on s. 23 for late responses (p. 61) (see also s. 25)

TF: recommended training on the application of the Act to solicitor-client-privileged records (p. 63, Rec. 4-25)

ICSR: same as IC93-94 (p. 69)

C-201: adds "(2) The disclosure of part of a record that contains information that is subject to solicitor-client privilege does not waive that privilege in respect of the rest of the document." (s. 17)

MFP: amend provision to confirm that disclosure of information from a record subject to privilege would not terminate privilege in respect of the rest of the information in the record; possibly include other privileges, such as "mediation privilege"; amend Act to exclude records obtained by the government in the course of a civil proceeding under an undertaking of confidentiality (p. 21-22)

Discussion Paper [p.20-22]

- "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."

- "Solicitor-client privilege is considered to be a cornerstone principle of the legal system, whether in the private sector or within government."

- "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."

See also the comments under section 25

The discussion paper suggests creating a new exemption for Settlement or "Without Prejudice" Privilege, this suggestion was not included in the OGA [Discussion Paper: p.27-28]

- "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."

24. Repeal.

Section 24 [Statutory prohibitions in Schedule II]

Section 24 requires the government to keep information secret even when there may be no reasonable justification for secrecy.

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

In its report of March, 1987, (**Open and Shut**) the Committee concluded as follows:

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

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

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

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

It would seem that the Committee's wise advice has fallen on deaf ears, as the statistics illustrate. When the **Access to Information Act** was proclaimed in 1983, the 33 statutes listed in Schedule II contained, among them, some 40 separate provisions restricting disclosure in some way. Three years later, at the time of the Parliamentary Review in June of 1986, the number had grown to 38 statutes incorporating 47 specific confidentiality provisions. As of today, that list has grown to 55 statutes, with 74 particular provisions requiring secrecy. Each year the coverage of the Act shrinks via section 24.

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

(2) Such committee as may be designated or established under section 75 shall review every provision set out in Schedule II and shall, not later than July 1, 1986 or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting, cause a report to be laid before Parliament on whether and to what extent the provisions are necessary.

O/S: recommended repeal of s. 24 and replace it with mandatory exemptions protecting the information referred to (in Schedule II) in the *Income Tax Act*, the *Statistics Act*, and the *Corporations and Labour Unions Returns Act* (p. 113-118)

S/A: Government will explore alternative methods of assuring confidentiality of information subject to Schedule II (p. 41-42)

IC93-94: repeal: this provision constitutes back-door erosion of access rights and there is no time-limit to the mandatory secrecy (p. 23-24)

IC00-01: repeal s. 24 (see IC93-94) (p. 58-59)

TF: retain s. 24; set out confidentiality criteria (for Schedule II) in the Act, criteria will require "firm" confidentiality commitments prior to inserting new provision into Schedule II; Schedule II should be as short as possible; periodic review of Schedule II (p. 65-66, Rec. 4-28, 4-29, 4-30, 4-31)

ICSR: same as IC-93-94 (p. 51-52)

C-201: repeals s. 24 (s. 18)

MFP: retain s. 24 and (i) assess which provisions should remain in Schedule II, and (ii) develop criteria for future additions to Schedule II - threshold should be high and information not able to be protected by other provisions of the Act (p. 23-24)

NOTE: With the- repeal of s. 24, there will be no protection from disclosure for census & income tax returns (for people deceased more than 20 years); consideration should be had to determine whether separate protection is needed.

Discussion Paper [p.19-20;26-27]

- "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."

- The Committee may wish to study whether the sensitive information currently covered under section 24 would be adequately protected elsewhere in the Act.

- “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.” (the discussion paper suggests some criteria)

25.(1) Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

(2) 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.

Section 25 [Severance]

A continuing source of debate concerns the legal effect when, pursuant to section 25 of the Act, a portion of a record is disclosed and the remaining withheld portion contains solicitor-client material. Does disclosure of a portion of the record jeopardize the privilege for the remaining, non-disclosed portion? The proposed amendment would settle this issue.

25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: It would be useful to spell out in the Act that the release of part of a record containing privileged information does not result in waiver of the privilege. (p.63-64, Rec. 4-26)
ICSR: no reference
C-201: no reference
MFP: no reference

See also references under s. 23

Discussion Paper [p.23]

- "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."

26. The head of a government institution may refuse to disclose any record requested under this Act or any part thereof if the head of the institution believes on reasonable grounds that the material in the record or part thereof will be published **in any form** by a government institution, agent of the Government of Canada or minister of the Crown within **sixty** days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

Section 26 [Material to be published]

The current provision authorizes government institutions to refuse access if the government plans to publish the requested record within 90 days. That period was chosen to take account of the advance time required for publication in 1983.

Today, 22 year later, sixty days is ample time, given modern printing methods.

Sixty days is also the period in the Alberta and British Columbia Acts.

The period in Newfoundland-Labrador is forty-five days.

26. The head of a government institution may refuse to disclose any record requested under this Act or any part thereof if the head of the institution believes on reasonable grounds that the material in the record or part thereof will be published by a government institution, agent of the Government of Canada or minister of the Crown within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

O/S: no reference
S/A: no reference
IC93-94: reduce period from 90 days to 60 days; to prevent abuse of 60-day period, if material is not forthcoming within 60 days then the ability of government institution to exempt portions should be lost (p. 24)
IC00-01: same as IC93-94 (p. 77-78)
TF: retain 90-day period with ability to extend; should only be used where there is a "high degree of certainty" that publication is forthcoming (p. 66-67, Rec. 4-32)
ICSR: same as IC93-94; "publication" should include electronic publication (p. 69-70)
C-201: change to 60 days (s. 19)
MFP: no reference

Discussion paper: No comments

26.1 The head of a government institution may, if the Information Commissioner so recommends after the investigation of a complaint under paragraph 30(1)(d.2), disregard an access request that is contrary to the purposes of this Act.

Section 26.1 [Request contrary to purposes of Act]

See notes for paragraph 30(1)(d.2), which read as follows:

Most jurisdictions, including the provinces and territories, have provisions in their statutes authorizing government institutions to refuse to answer any request that is clearly improper. This amendment authorizes the head of a government institution to complain about such a request to the Information Commissioner. By virtue of proposed section 26.1, the head may refuse to process any such request if, upon complaint, the Information Commissioner so recommends.

The Framework Paper and Task Force support the idea that institutions be allowed to refuse to process requests that are frivolous, vexatious or abusive. Both would require the agreement of the Information Commissioner.

(new provision)

O/S: no reference
S/A: Government will consider amendments to permit the refusal to process trivial, frivolous and disruptive requests (p. 44-45)
IC93-94: amend the Act to allow government institutions to refuse to process requests that are frivolous or abusive; decision subject to appeal to IC, who would issue a binding ruling (p. 9); proposal in conjunction with suggestion to eliminate access fees
IC00-01: same as IC93-94 (p. 66-67)
TF: amend Act to allow government institutions to refuse to process frivolous , vexatious, or abusive requests (p. 73, Rec. 5-4)
ICSR: TF's recommendation could be justified provided the term "abusive" is carefully defined and its use limited (p. 22)
C-201: no reference
MFP: supports addition of "frivolous and vexatious" provision, with complaints to the IC pursuant to the existing complaint and investigation process (p. 27)

Discussion Paper [p.38]

- 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.

Similar provisions in other jurisdictions: The Ontario and British Columbia statutes allow the government to refuse to respond to frivolous or abusive requests, subject to an appeal to the Information Commissioner. Newfoundland's statute allows the head of a public body to refuse to process repetitive or incomprehensible requests.

27.(1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain

(*a*) trade secrets of a third party,

(*b*) **Repeal**

(*c*) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)**(*b*) or (*c*)** in respect of a third party,

the head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

Section 27 [Notice to third party]

Paragraph 27(1)(b) is being repealed as a consequence of the repeal of paragraph 20(1)(b).

27.(1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain

(*a*) trade secrets of a third party,

(*b*) information described in paragraph 20(1)(*b*) that was supplied by a third party, or

(*c*) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of a third party,

the head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

See references from s. 20 [Economic interests of third parties]

29.(1) Where, **during the course of an investigation by the Information Commissioner**, the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give written notice of the decision to

(*a*) the person who requested access to the record; and

(*b*) any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had at the time of the request intended to disclose the record or part thereof.

Section 29 [Notice of decision to disclose]

This amendment will protect the rights of requesters and third parties even if a government institution decides to disclose a record before a recommendation is made by the Commissioner.

29.(1) Where the head of a government institution decides, on the recommendation of the Information Commissioner made pursuant to subsection 37(1), to disclose a record requested under this Act or a part thereof, the head of the institution shall give written notice of the decision to:

(*a*) the person who requested access to the record; and

(*b*) any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had at the time of the request intended to disclose the record or part thereof.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

30.(1)(d.2) from heads of government institutions who believe that an access request should be disregarded as being contrary to the purposes of this Act;

Paragraph 30(1)(d.2)[Complaint from government institution]

Most jurisdictions, including the provinces and territories, have provisions in their statutes authorizing government institutions to refuse to answer any request that is clearly improper. This amendment authorizes the head of a government institution to complain about such a request to the Information Commissioner. By virtue of proposed section 26.1, the head may refuse to process any such request if, upon complaint, the Information Commissioner so recommends.

The Framework Paper and Task Force support the idea that institutions be allowed to refuse to process requests that are frivolous, vexatious or abusive. Both would require the agreement of the Information Commissioner.

30.(1) Subject to this Act, the Information Commissioner shall receive and investigate complaints

(*a*) from persons who have been refused access to a record requested under this Act or a part thereof;

(*b*) from persons who have been required to pay an amount under section 11 that they consider unreasonable;

(*c*) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;

(*d*) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;

(*d.1*) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;

(*e*) in respect of any publication or bulletin referred to in section 5; or

(*f*) in respect of any other matter relating to requesting or obtaining access to records under this Act.

See references from s. 26.1 [Frivolous & Vexatious/Contrary to Purposes of Act]

Discussion Paper : see comments under s. 26.1 (p. 63)

30.(1)(e.1) in respect of the addition of, or failure to add, any department, ministry of state, body or office to Schedule I pursuant to subsection 77(2);

Paragraph 30(1)(e.1) [Complaint re: Schedule I]

Subsection 77(2) directs the Governor in Council to keep under review and, by order, add to Schedule I certain categories of departments, ministries, bodies or offices. This paragraph creates a right of complaint to the Information Commissioner in respect of that function of the Governor in Council. While the Information Commissioner may only make a finding of fact as to whether a certain organization fits the criteria for being added to Schedule I and, if it should, so recommend, subsection 42(1) gives the complainant the right to go to the Federal Court to seek review of a refusal, or decision, to add to the schedule.

30.(1) Subject to this Act, the Information Commissioner shall receive and investigate complaints

(*a*) from persons who have been refused access to a record requested under this Act or a part thereof;

(*b*) from persons who have been required to pay an amount under section 11 that they consider unreasonable;

(*c*) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;

(*d*) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;

(*d.1*) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;

(*e*) in respect of any publication or bulletin referred to in section 5; or

(*f*) in respect of any other matter relating to requesting or obtaining access to records under this Act.

See references for s. 77(2) [Criteria for addition to Schedule I]

Discussion Paper [p.39]

- "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."

30(3) The Information Commissioner may initiate a complaint into any matter relating to requesting or obtaining access to records under this Act.

Subsection 30(3) [Routine investigations]

The proposed amendment is intended to ensure that the Information Commissioner has the authority to commence investigations that are in the nature of routine audits, without the need to meet the "reasonable grounds to investigate" threshold.

30.(3) Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof.

O/S: recommended a broad audit power concerning implementation of the Act (p. 37)
S/A: it is not necessary for the IC to have general audit authority (p. 45-46)
IC93-94: no reference
IC00-01: no reference
TF: amend Act to authorize the IC to conduct assessments of practices of institutions having an impact on compliance (p. 94-96, Rec. 6-8)
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper [p.37]

- "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."

30.(4) An investigation into a complaint under this section shall be completed within 120 days after the complaint is received or initiated by the Information Commissioner unless the Commissioner

(a) notifies the person who made the complaint, the head of the government institution concerned and any third party involved in the complaint that the Commissioner is extending the time limit, and

(b) provides an anticipated date for the completion of the investigation.

Subsection 30(4) [Time limit for investigations]

At present, there is no time limit for the completion of an investigation of a complaint. The proposed amendment would give a 120-day target to the Commissioner after which time the Commissioner would be required to inform a complainant of the expected completion date. This process, when combined with proposed subsection 41(2), would allow a complainant the choice of waiting for the investigation to be completed or to proceed directly to the Federal Court.

(new provision)

O/S: recommended that Act be amended to impose time limit of 60 days on the IC's investigations (p. 68)
S/A: recommended that a time limit for the Information Commissioner's investigation be set (p. 36)
IC93-94: no reference
IC00-01: no reference
TF: amend Act to require that IC investigations be completed within 90 days, with discretion to extend the time limit with notice to the requester, the government institution, and any third party (p. 101-102, Rec. 6-16)
ICSR: criticize the TF recommendation, (coupled with resource control) investigations will become more formal (p. 27)
C-201: no reference
MFP: does not entirely agree with TF recommendation of 90-day time limit for IC investigation (p. 28)

Discussion Paper [p.39]

- It "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."

30.(5) A complaint made under this section in respect of a request made to the Office of the Information Commissioner or in respect of any other matter concerning that office shall be made to and investigated in accordance with this Act by an independent person authorized under section 59.

Subsection 30(5) [Independent investigator]

Under proposed subsection 77(2) the offices of all Officers of Parliament would be subject to the **Access to Information Act**. Subsection 30(5) deals with the process by which a complaint against the Office of the Information Commissioner would be handled. The process is similar to the one currently used by the Commissioner of Official Languages for complaints against that office under the **Official Languages Act**.

(new provision)

O/S: add Office of the Information Commissioner to coverage of Act; no further recommendation re: complain process (p. 9)
S/A: no reference
IC93-94: OIC should be added to Schedule I; special provision should be made for the handling of complaints against the OIC (p. 36)
IC00-01: same as IC93-94 (p. 56)
TF: add OIC to Schedule I; Act should provide for designation of retired judge to investigate access to information complaints against the OIC (p. 170, Rec. 2-7)
ICSR: add OIC to Schedule I (p. 47)
C-201: adds OIC to Schedule I but does not include alternative investigator re: complaints about the OIC (s. 27)
MFP: considers adding OIC to Schedule I but no reference to complaints against OIC (p. 9)

Discussion Paper [p.6-7]

- There is a "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 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."

31.(1) A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise.

(2) A complaint under this Act that relates to a request for access to a record shall be made within 60 days after the request was answered.

Section 31 [Time limit for complaint]

The current provisions of the Act which set a deadline for filing a complaint with the Information Commissioner "within one year from the time when the request for the record…was made", have not worked well in practice. The Task Force pointed out that one year is a disproportionately long time in most cases, but it can also be too short in cases where answering the request takes more than a year. In such cases, requesters can lose their right to complain before they have received a reply. As proposed, complaints arising from an answer to an access request must be filed within 60 days of receipt of the answer. With respect to complaints unrelated to an access request, no time limit would apply.

31. A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise and shall, where the complaint relates to a request for access to a record, be made within one year from the time when the request for the record in respect of which the complaint is made was received.

O/S: no reference
S/A: time limits set out in the Act are reasonable and should not be changed (p. 35-36)
IC93-94: no reference
IC00-01: no reference
TF: pointed out that where institution's response takes more than one year the requester loses right to complain; recommends that complaint be made within 60 days of response by the institution or, where no response is forthcoming, within such reasonable time as the IC may allow (p. 91-92, Rec 6-3)
ICSR: no reference
C-201: maintains current period of one year from request, but adds "or within such further time as the Commissioner may fix or allow" (p. 21)
MFP: would appreciate view of the Committee on TF recommendations (complaint made within 60 days of response) (p. 28)

Discussion paper: No comments

Federal Accountability Act

31. A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise. If the complaint relates to a request by a person for access to a record, it shall be made within sixty days after the day on which the person receives a notice of a refusal under section 7, is given access to all or part of the record or, in any other case, becomes aware that grounds for the complaint exist. (s.151, in force)

35.(1) Every investigation of a complaint under this Act by the Information Commissioner shall be conducted in private.

(2) In the course of an investigation of a complaint under this Act by the Information Commissioner, a reasonable opportunity to make representations shall be given to

(*a*) the person who made the complaint,

(*b*) where the complaint is made under paragraph 30(1)(d.2), the person who made the request giving rise to the complaint;

(*c*) the head of the government institution concerned, and

(d) where the Information Commissioner intends to recommend under subsection 37(1) that a record or a part thereof be disclosed that contains or that the Information Commissioner has reason to believe might contain

(i) trade secrets of a third party,
(ii) **Repealed**
(iii) information the disclosure of which the Information Commissioner could reasonably foresee might effect a result described in paragraph 20(1)(b) or (c)

(*d*) in respect of a third party, the third party, if the third party can reasonably be located, but, **unless authorized by the Information Commissioner, and subject to section 64,** no one is entitled as of right to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

Section 35 [Investigations]

Paragraph 35(2)(ii) has been repealed in keeping with the repealing of paragraph 20(1)(b).

Neither the Framework Paper, Bill C-201 nor the Task Force made similar recommendations.

Paragraph 35(2) has been amended to clarify the authority of the Information Commissioner to authorize a person to be present during, to have access to or comment on representations made to the Commissioner by others – subject, of course, to the provisions of section 64.

35.(1) Every investigation of a complaint under this Act by the Information Commissioner shall be conducted in private.

(2) In the course of an investigation of a complaint under this Act by the Information Commissioner, a reasonable opportunity to make representations shall be given to

(*a*) the person who made the complaint,

(*b*) the head of the government institution concerned, and

(*c*) where the Information Commissioner intends to recommend under subsection 37(1) that a record or a part thereof be disclosed that contains or that the Information Commissioner has reason to believe might contain
(i) trade secrets of a third party,
(ii) information described in paragraph 20(1)(*b*) that was supplied by a third party, or

(iii) information the disclosure of which the Information Commissioner could reasonably foresee might effect a result described in paragraph 20(1)(*c*)

or (*d*) in respect of a third party, the third party, if the third party can reasonably be located,

but no one is entitled as of right to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: recommended amending s. 35 to provide that investigations may be conducted in private; the IC should be given the discretion to conduct investigations in private, but should not be required to do so (p. 104-105, Rec. 6-18)
ICSR: the proposal for public hearings would have a “judicializing” effect, that is not appropriate for an investigative agency (p. 27)
C-201: no reference
MFP: no reference

Discussion Paper: See comments under section 64

36.(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, **or solicitor-client privilege,** the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

Subsection 36(2) [Examination of any record]

This amendment is intended to clarify that the Commissioner may, during an investigation, examine solicitor-client privileged information. The amendment would address the decision of the Federal Court of Appeal in *Canada* (*Attorney General* v. *Canada (Information Commissioner),(The Attorney General of Canada and Mel Cappe)* 2005 FCA 199

36.(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: amend the Act to provide that the IC cannot compel an institution or an individual to produce a communication from or to a legal advisor about the client's rights and obligations under the Act or in contemplation of proceedings under the Act (p. 109-110, Rec. 6-22)
ICSR: critizice TF's recommendation (p. 26-27)
C-201: no reference
MFP: no reference

Discussion paper: No comments

36.(3) Except in a prosecution of a person for an offence under section 131 of the Criminal Code (perjury) in respect of a statement made under this Act, in a prosecution for an offence under **section 67 (obstruction)** or in a review before the Court under this Act or an appeal therefrom, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

Subsection 36(3) [Evidence in other proceedings]

This proposed amendment should have been made, but was overlooked, when s. 67.1 was added as an offence under the Act.

36.(3) Except in a prosecution of a person for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, in a prosecution for an offence under this Act, or in a review before the Court under this Act or an appeal therefrom, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: amend s. 36(3) to specify that evidence given to the Commissioner by a witness is inadmissible against the witness in a prosecution of an offence under s. 67.1 (p. 78)
TF: amend 36(3) to specify that evidence given to the IC by a witness is inadmissible against the witness in the prosecution of an offence under s. 67.1; the IC and staff are not competent or compellable witnesses in a prosecution under s. 67.1 of the Act (p. 110-111, Rec. 6-24)
ICSR: amend 36(3) to specify that evidence given to the IC by a witness is inadmissible against the witness in a prosecution of an offence under 67.1(p. 70)
C-201: no reference
MFP: no reference

Discussion paper: No comments

Federal Accountability Act

36 (3) Except in a prosecution of a person for an offence under section 131 of the Criminal Code (perjury) in respect of a statement made under this Act, in a prosecution for an offence under section 67, in a review before the Court under this Act or in an appeal from such proceedings, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings. (s.153, in force)

36.(5) Any **original** document or thing produced pursuant to this section by any person or government institution shall be returned by the Information Commissioner within ten days after a request is made to the Commissioner by that person or government institution, but nothing in this subsection precludes the Commissioner from again requiring its production in accordance with this section **or from making and retaining copies of any document or thing**.

Subsection 36(5) [Return of documents]

This amendment makes explicit what the Federal Court has already ruled is implicit in the provision, i.e., that the Commissioner may make and retain copies of records obtained from government institutions and need only return originals, if so requested in accordance with this provision. [*Canada (Attorney General)* v. *Canada (Information Commissioner),* 2004 FC 431 (Dawson J.)]

36.(5) Any document or thing produced pursuant to this section by any person or government institution shall be returned by the Information Commissioner within ten days after a request is made to the Commissioner by that person or government institution, but nothing in this subsection precludes the Commissioner from again requiring its production in accordance with this section.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

37.(2) The Information Commissioner shall, after investigating a complaint under this Act, report to **any person or third party** entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(*b*) no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

Subsection 37(2) [Report to person or third party]

This provision is amended to take into account the fact that government institutions may also be complainants by virtue of paragraph 30(1)(d.2).

37.(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(*b*) no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

See references for 26.1 [Request contrary to purposes of Act]

Discussion paper: See comments under s.30(1)(d.2)

37.1 Notwithstanding any other Act of Parliament, a person does not commit an offence or other wrongdoing by disclosing, in good faith to the Information Commissioner, information or records relating to a complaint under this Act.

Section 37.1 [Whistleblower protection]

This proposed section is intended to protect persons who disclose, in good faith, information or records to the Information Commissioner about matters covered by the Act. The proposal is based on a provision contained in the Alberta statute.

(new provision)

O/S: in favour of "whistleblowing" legislation to protect public servants who reveal serious misconduct (p. 86-87)
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

Similar provisions in other jurisdictions: Alberta: s. 82 [Disclosure to Commissioner]: (5) "A public body or person acting on behalf of a public body must not take any adverse employment action against an employee because the employee, acting in good faith, (a) has disclosed information to the Commissioner under this section, or (b) has exercised or may exercise a right under this section"

38.(2) If, in the opinion of the Information Commissioner, the head of a government institution failed, without valid reason, to take any action required by this Act, the Information Commissioner shall include the name of the institution and the particulars of the failure in the annual report that relates to the financial year in which the failure occurred.

Subsection 38(2) [Reporting failure to take action]

This new subsection makes it mandatory for the Information Commissioner to name any government institution whose head has failed, without valid excuse, to take any action required by the Act.

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new provision
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O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: adds a similar provision: (2) “The Information Commissioner shall set out in the annual report the name of every government institution, if any, the head of which, in the opinion of the Information Commissioner, failed in the year, without valid excuse, to take any action required by this Act.”
(3) “Before naming a government institution under subsection (2), the Information Commissioner shall provide the head of the government institution with an opportunity to make representations in respect of the failure to take the required action.”(s. 22)
MFP: no reference

Discussion paper: No comments

38.(3) Before naming a government institution under subsection (2), the Information Commissioner shall provide the head of the institution with an opportunity to make representations in respect of the failure to take the required action.

Subsection 38(3) [Right to make representations]

This new subsection requires that the Information Commissioner provide the head of a government institution who is about to be named pursuant to subsection (2) with an opportunity to make representations in respect of the failure noted in subsection (2).

new provision

See references for s. 38(2) [Reporting failure to take action]

Discussion paper: No comments

41.(1) Any person who believes that the Governor-in-Council has failed to make an addition to Schedule I that is required by subsection 77(2), whose access request has been disregarded pursuant to section 26.1 or who has been refused access to a record requested under this Act or a part thereof, or who has received a notice under subsection 9(1) or 11(5), may, if a complaint has been made to the Information Commissioner in respect of any such matter, apply to the Court for a review of the matter within forty-five days after the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2).

Subsection 41(1) [Review by Federal Court]

These are consequential amendments that grant access to the Federal Court review to those who have been constructively denied access to records or who believe that the obligation set out in subsection 77(2) (additions to Schedule I) has not been properly discharged or to those whose requests have been disregarded as contrary to the purposes of the Act.

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: permit requesters to complain and go to Federal Court about unreasonable fees charged (p. 91, Rec. 6-2); (also recommended differential commercial fee structure)
ICSR: the TF's recommendations is too limited, requesters should have the right to enforce any decision. (p. 24)
C-201: no reference
MFP: no reference

NOTE: See also definition of "refused access to a record" in s. 41(4)

Discussion Paper: See comments under sections 30(1)(d.2) and 77(2)

41.(2) If a person has made a complaint to the Information Commissioner in respect of a matter referred to in subsection (1) and has not received a report from the Information Commissioner by the expiration of the time limit for making the report under subsection 30(4), the person may apply to the Court for a review of the matter within forty-five days after the day on which the time limit expired.

Subsection 41(2) [Right to judicial review on expiration of time limit]

This amendment is required since the Federal Court decision which concluded that an unreasonable time extension was not a "deemed refusal" which could be reviewed by the court until the expiration of the unreasonable period of extension. [*Canada (Information Commissioner)* v. *Canada (Attorney General)*, 2003 FCA 226]

(new provision)

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

NOTE: In view of the new definition of "deemed refusal" in s. 41

Discussion paper: No comments

41.(3) A person referred to in subsection (1) or (2) may, either before or after the expiration of the applicable forty-five day period, apply to the Court for an extension of that period

Section 41(3) [Extension of 45-day period]

Similar to current provisions for applications to the Federal Court for reviews found in section 41.

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

41.(4) For the purposes of subsection (1), the words "refused access to a record" include being denied access to a record, or a part thereof, by

(a) an unreasonable refusal to provide a record, or a part thereof, in the official language requested by the person;

(b) an unreasonable refusal to provide a record, or a part thereof, in an alternative format;

(c) a requirement that the person pay an amount under section 11 that is unreasonable; or

(d) an unreasonable extension of the time limits under section 9.

Section 41(4) [Section 41 definitions]

This provision defines the words used in subsection (1) for greater clarity regarding who has the right to apply for review.

new provision

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

42.**(1)** The Information Commissioner may

(a) apply to the Court, within the time limits prescribed by section 41, for a review of any matter in respect of which an investigation has been carried out by the Information Commissioner under this Act;

Subsection 42(1)(a) [Information Commissioner may apply or appear]

This is an amendment consequential to changes to section 41 and changes the previous wording so that the Information Commissioner has the power to ask the Federal Court for a review of any **matter** under the Act in respect of which he has carried out an investigation. It also removes the necessity for the consent of the person who requested records under the Act. Removing the necessity for consent will be useful when the review is necessitated by a weakness in the law or there is a need for clarification of the law and the complainant has no desire to carry the case further.

42.(1) The Information Commissioner may

(*a*) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record; ...

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

42.(2) Where the Information Commissioner makes an application under paragraph (1)(a) the person who made the complaint that gave rise to the investigation may appear as a party to the review.

Subsection 42 (2) [Complainant may appear as party]

This is a consequential amendment to ensure that the complainant has a right to appear as a party to any Federal Court review.

42.(2) Where the Information Commissioner makes an application under paragraph (1)(*a*) for a review of a refusal to disclose a record requested under this Act or a part thereof, the person who requested access to the record may appear as a party to the review.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

46. Notwithstanding any other Act of Parliament or any privilege under the law of evidence, **or solicitor-client privilege,** the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

Section 46 [Court access to records]

See comments under subsection 36(2). This amendment clarifies that the Court may examine any solicitor-client privileged material in the cause of a review under this Act.

46. Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

See references from s. 36(2) [Examination of any record]

Discussion paper: No comments

54.(1) The Governor in Council shall, by commission under the Great Seal, appoint an Information Commissioner after approval**, by a two-thirds majority,** of the appointment by resolution of the Senate and House of Commons.

Subsection 54(1) [Appointment of Information Commissioner]

This amendment seeks to ensure that an Information Commissioner may only be appointed if he or she has broad support in the House of Commons and Senate. This goal is particularly important in majority government situations.

54.(1) The Governor in Council shall, by commission under the Great Seal, appoint an Information Commissioner after approval of the appointment by resolution of the Senate and House of Commons

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

Federal Accountability Act

54. (1) The Governor in Council shall, by commission under the Great Seal, appoint an Information Commissioner after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons. (s.109, in force)

54.(2) Subject to this section, the Information Commissioner holds office during good behaviour for a term of seven years, but may be removed by the Governor in Council at any time by resolution**, passed by a two-thirds majority,** of the Senate and House of Commons.

Subsection 54(2) [Removal of Information Commissioner]

This amendment would ensure that an Information Commissioner could only be removed if there were broad support in Parliament for such an action.

54.(2) Subject to this section, the Information Commissioner holds office during good behaviour for a term of seven years, but may be removed by the Governor in Council at any time on address of the Senate and House of Commons.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

Federal Accountability Act

54. (2) Subject to this section, the Information Commissioner holds office during good behaviour for a term of seven years, but may be removed for cause by the Governor in Council at any time on address of the Senate and House of Commons.

(4) In the event of the absence or incapacity of the Information Commissioner, or if that office is vacant, the Governor in Council may appoint any qualified person to hold that office in the interim for a term not exceeding six months, and that person shall, while holding office, be paid the salary or other remuneration and expenses that may be fixed by the Governor in Council. (s. 109, in force)

54.(5) A person appointed under subsection (4) may not be appointed as Information Commissioner under subsection (1).

Subsection 54(5) [Interim Information Commissioner]

This subsection allows Governor in Council – effectively the Prime Minister – to appoint an interim Information Commissioner for a period not exceeding six months. This amendment ensures that any such appointment is truly "interim" in nature.

(new provision)

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

58.(2) The Information Commissioner may engage on a temporary basis the services of persons having technical or specialized knowledge of any matter relating to the work of the Commissioner to advise and assist the Commissioner in the performance of the duties and functions of the Commissioner under this or any other Act of Parliament and **[amended by omitting words]** may fix and pay the remuneration and expenses of those persons.

Subsection 58(2) [Technical Assistance]

By removing the words: "with the approval of Treasury Board", a potential for interference with the Commissioner's independence is removed.

58.(2) The Information Commissioner may engage on a temporary basis the services of persons having technical or specialized knowledge of any matter relating to the work of the Commissioner to advise and assist the Commissioner in the performance of the duties and functions of the Commissioner under this or any other Act of Parliament and, with the approval of the Treasury Board, may fix and pay the remuneration and expenses of those persons.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

59.(2) The Information Commissioner may not, nor may an Assistant Information Commissioner, delegate the investigation of any complaint resulting from a refusal by the head of a government institution to disclose a record or a part of a record by reason of paragraph 13(1)(a) or (b) or section 15 except to one of a maximum of

(a) eight officers or employees of the Commissioner specifically designated by the Commissioner for the purpose of conducting those investigations; or

(b) such greater number of officers or employees than the number referred to in paragraph (a) as may be authorized by regulation.

Section 59(2) [Delegation]

The current provision states that investigations of refusals pursuant to sections 13(1)(a), (b), and 15 must be delegated to one of a maximum of four designated officers. The proposed amendment increases the number of designated investigators to eight and adds a mechanism to respond to workload increases in future.

59.(2) The Information Commissioner may not, nor may an Assistant Information Commissioner, delegate the investigation of any complaint resulting from a refusal by the head of a government institution to disclose a record or a part of a record by reason of paragraph 13(1)(*a*) or (*b*) or section 15 except to one of a maximum of four officers or employees of the Commissioner specifically designated by the Commissioner for the purpose of conducting those investigations.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

Federal Accountability Act

59. (2) The Information Commissioner or an Assistant Information Commissioner may not delegate the investigation of a complaint resulting from a refusal by the head of a government institution to disclose all or part of a record under paragraph 13(1)(a) or (b) or section 15 except to one of eight officers or employees — or one of any greater number of officers or employees fixed by the designated Minister — specifically designated by the Commissioner for the purpose of conducting those investigations. (s. 156, in force)

[See also s.77(1.1)]

60.1 The Information Commissioner is generally responsible for monitoring the administration of this Act to ensure that its purposes are achieved. Accordingly, the Information Commissioner may

(a) make public comment on the transparency and accountability implications of proposed legislative schemes or government programs;

(b) undertake initiatives to inform individuals and government institutions of their rights and obligations under this Act;

(c) receive comments from the public concerning the administration of this Act;

(d) bring to the attention of the head of a government institution any failure by the government institution to assist applicants under subsection 2(3); and

(e) engage in or commission research into any matter that may affect the attainment of the purposes of the Act.

Section 60.1 [Monitor Administration of Act]

This new section provides that the Information Commissioner is responsible for monitoring the administration of the Act. As recommended by the Task Force, the Information Commissioner is given the mandate to engage in public education activities. In addition, he is authorized to receive comments from the public and to monitor non-compliance with s. 2(3), the duty on government institutions to assist requesters. Similar powers are found in the Ontario, Alberta, British Columbia, and Manitoba acts.

(new provision)

O/S: recommended that the Information Commissioner foster public understanding of the Act and of the principles in s. 2; Treasury Board should undertake public education campaign (p. 7-8, Rec. 2.1, 2.2)
S/A: government will amend the Act to provide a public education mandate for the OIC (p. 31)
IC93-94: no reference
IC00-01: mention of the TF's recommendation. (p. 25)
TF: amend Act to recognize role of IC in educating public about the Act (p. 93, Rec. 6-5)
ICSR: no reference
C-201: no reference
MFP: interested in Committee's view on the TF proposal (p. 28)

Discussion Paper [p.39-40]

- "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 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.”

- “The Government also supports the Information Commissioner in his desire to conduct research into matters related to his duties or functions.”

63.(1) The Information Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information

(*a*) that, in the opinion of the Commissioner, is necessary to:
(i) carry out an investigation under this Act,
(ii) give a meaningful opportunity to make representations under subsection 35(2),
(iii) establish the grounds for any findings or recommendations contained in a report made under this Act; or
(iv) make the public aware of any matters related to the Commissioner's duties as he or she considers appropriate.

Section 63 [Disclosure Authorized]

Given the responsibilities and powers set out in the new s. 60.1, this amendment allows for the Information Commissioner to disclose information that is necessary to communicate to the public matters related to his duties. This provision is subject to s. 64 of the Act.

63.(1) The Information Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information

(*a*) that, in the opinion of the Commissioner, is necessary to:
(i) carry out an investigation under this Act, or
(ii) establish the grounds for findings and recommendations contained in any report under this Act; or

(*b*) in the course of a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appeal therefrom.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper: See comments under section 64

64. In carrying out an investigation under this Act and in any report made to Parliament under section 38 or 39, **or in any communication to the public,** the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner shall take every reasonable precaution to avoid the disclosure of, and shall not disclose,

(a) as is.

(b) as is.

Section 64 [Information not to be disclosed]

This amendment is included as a necessary adjunct to the power set out in s. 63(1)(iv) (disclosing information necessary to communicate to the public matters related to his duties). The addition of the phrase "or in any communication to the public" is designed to ensure that the Information Commissioner takes precautions not to disclose any information described in s. 64.

64. In carrying out an investigation under this Act and in any report made to Parliament under section 38 or 39, the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner shall take every reasonable precaution to avoid the disclosure of, and shall not disclose,

(*a*) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or

(*b*) any information as to whether a record exists where the head of a government institution, in refusing to give access to the record under this Act, does not indicate whether it exists.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper [p.37-38]

- "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."

- "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."

- "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.”

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**).

Section 67.1 [Obstructing right of access]

See section 2.1.

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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; or

(d)direct, propose, counsel or cause any person in any manner to do anything
   mentioned in any of paragraphs (a) to (c).
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O/S: no reference
S/A: no reference
IC93-94: "The *Archives Act* should be amended specifically to impose the duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures, and transactions."; "to this day, some officials have no hesitation in admitting, even advocating, that important matters simply be not written down or preserved." (p. 7, 3)
IC00-01: Information management legislation should impose a "duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures, and transactions". (p. 66)
TF: recommended the setting of standards for public officials concerning documentation of government business, but no legislative change (p. 146)
ICSR: the duty to create records is not being respected; there should be a legal obligation on all public officials to (i) document their business activities (decisions, actions, transactions, considerations), and (ii) ensure that those records are properly included in an institutional system of records (p. 30, 57)
C-201: adds 67.2 offence of obstructing the right to access under the Act; destroying information in accordance with the *Library and Archives of Canada Act* does not trigger offence (s. 23)
MFP: no reference

Discussion paper: see comments under s. 2.1

68. This Act does not apply to

(a) published material or material available for purchase by the public if such material is available at a reasonable price and in a format that is reasonably accessible;

Section 68(a) [Published material]

Subsection 68(a) excludes from the Act "published material or material available for purchase by the public". The amendment to 68(a) ensures that only information that is reasonably priced and available in a reasonably accessible format is excluded from the Act.

68. This Act does not apply to

(*a*) published material or material available for purchase by the public;

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: amend Act to ensure that only information that is reasonably priced and reasonably accessible to the public is excluded (p. 66, 78)
TF: no change to provision. (p. 66-67)
ICSR: same as IC00-01 (p. 70)
C-201: adds "if that material is reasonably priced and reasonably accessible to the public"
MFP: no reference

Discussion paper: No comments

69.(1) The head of a government institution shall refuse to disclose any record requested under this Act that contains confidences of the Queen's Privy Council for Canada.

(a) repeal

(b) repeal

(c) repeal

(d) repeal

(e) repeal

(f) repeal

(g) repeal

(2) In this section, "confidences of the Queen's Privy Council for Canada" means information which, if disclosed, would reveal the substance of deliberations of Council or the substance of deliberations between or among ministers;

"Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(3) Subsection (1) does not apply to

(a) confidences of the Queen's Privy Council for Canada that have been in existence for **fifteen years or more**;

(b) background explanations, analyses of problems, or policy options presented to Council for consideration by Council in making decisions, if
(i) the decisions to which the information relates have been made public, or
(ii) four years have passed since the decisions were made; or

(c) decisions of the Queen's Privy Council if
(i) the decisions or the substance of the decisions have been made public; or
(ii) four years have passed since the decisions were made.

Section 69 [Confidences of the Queen's Privy Council for Canada]

The amended s. 69 provides that confidences of the Queen's Privy Council for Canada are subject to a mandatory exemption from disclosure. A substantive definition of Cabinet confidences is set out: information the disclosure of which would reveal the substance of deliberations of Council and the substance of deliberations between or among ministers. This general definition would remain current in the event of changes to the Cabinet paper process and to the nature and types of records created.

As with other exemption provisions, a refusal to disclose may be subject to an investigation by the Information Commissioner and review by the Federal Court. This approach fulfils the principle in s. 2 of the Act that decisions on the disclosure of government information should be reviewed independently of government.
There are two exceptions to the Cabinet confidence exemption set out in the current Act. The proposed s. 69 maintains the exception from protection for those Cabinet confidences

that are 20 years old, although the period is reduced to 15 years. As recommended by the Standing Committee on Justice, the period of 15 years represents the life of three Parliaments. It is also consistent with the time period found in the Alberta and British Columbia acts.

In addition, the proposed s. 69 maintains the current Act's requirement that "background explanations, analysis of problems or policy options presented to council for consideration by council in making decisions" be disclosed after the decisions to which such information relates is made public, or if not made public, four years thereafter.

A third category of exception to Cabinet secrecy is added to the proposed s. 69: decisions of Cabinet if the decisions have been made public, or, in any event, if four years have passed since the taking of the decisions.

69.(1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

(*a*) memoranda the purpose of which is to present proposals or recommendations to Council;

(*b*) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(*c*) agenda of Council or records recording deliberations or decisions of Council;

(*d*) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(*e*) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*);

(*f*) draft legislation; and

(*g*) records that contain information about the contents of any record within a class of records referred to in paragraphs (*a*) to (*f*).

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

(3) Subsection (1) does not apply to

(*a*) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or

(*b*) discussion papers described in paragraph (1)(*b*)
(i) if the decisions to which the discussion papers relate have been made public, or
(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

O/S: Cabinet confidences should be subject to a class-tested, discretionary exemption; exemption should cover agendas, minutes of meetings and draft legislation or regulations that have been in existence for fewer than 15 years; to be reviewed only by the ACJ of the Federal Court (not the IC); provision should include the following definition of Cabinet confidences: "(a) agenda of Council or records recording deliberations or decisions of Council; (b) a record used for or reflecting consultation among Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; (c) draft legislation or regulations; (d) records that contain information about the contents of any records within a class of records referred to in paragraph (a) to (c)" (p. xiv, 29-33)

S/A: government rejected O/S proposal stated above; Cabinet deliberations must be kept secret to preserve the convention of collective Cabinet responsibility (p. 40)

IC93-94: convert s. 69 into exemption; change 20-year exclusion period to 15 years; redraft 69(3) to cover analysis portions of memoranda to Cabinet: release if a decision has been made public, if decision implemented, or if five years have passed since the decision made/considered; appeals of decisions under exemption to be heard by A.C.J. of Federal Court after review by the IC (p. 25)

IC00-01: current provision is more restrictive than any provincial statute; narrow the scope of Cabinet secrecy by confining it to information that would reveal the deliberations of Cabinet; change to mandatory class exemption; state non-inclusive, illustrative list in the Act: agenda, minute or other records of the deliberations of Council or its committees, record containing recommendations submitted to Council or its committees, record containing background explanations, analysis of problems or policy options for consideration by Council; record used for reflecting communications or discussions among ministers, record prepared for the purpose of briefing a Minister in relation to matters brought before Cabinet, draft legislation; reduce time limit on Cabinet confidence from 20 to 15 years; background explanations, analysis of problems and policy options excluded from Cabinet confidences; decisions of Cabinet as appeal body not Cabinet confidences; protection subject to public interest override (p. 43-54)

TF: change to mandatory, class exemption; insert definition of “Cabinet confidence” as information that would reveal the substance of matters before Cabinet, and deliberations between or among ministers; develop prescribed format for Cabinet documents that would allow for easy severance of background explanations and analyses, amend Act to allow access to background material once the decision is announced, or after five years (unless another exemption applies); reduce protection for Cabinet confidences from 20 to 15 years; decision to refuse disclosure should only be reviewed by the Federal Court (p.44-47, Rec. 4-3 to 4-7)

ICSR: same as IC00-01 (p. 34-45); criticize the one-step process of the review, without the right to complaint to the Information Commissioner; more information is swept in the proposed exemption; proposed exemption is mandatory with no mechanism by which the privilege can be waived. (p.17-19)

C-201: amends Act to add mandatory exemption for Cabinet confidences; definition of Cabinet confidences: “any information that would reveal the substance of deliberations between minister of the Crown in respect of the making of government decisions or the formulation of government policy, including decisions of Council before they are implemented, and includes draft legislation.”; Cabinet confidence protection limited to 15 years (s. 25)

MFP: would consider narrowing the definition of Cabinet confidence to include “information or communications that reveal the substance of Cabinet’s deliberations, decisions, and submissions”; definition should give full effect to Ethyl decision; keep s. 69 as exclusion, but allow IC to ask for Federal Court review of matter; do not change 20-year protection period (p. 13-15)

Discussion Paper [p.9-11]

- “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”.

- This principle has been widely recognized by the courts. (See Babcock 2002 SCC 57)

- “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.”

- It is possible that the review of sensitive Cabinet confidence information by the Information Commissioner and the courts would expose and undermine this process.

- “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.”

- “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.”

- “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.”

Similar provisions in other jurisdictions: All provinces and territories have a mandatory exemption (except for Nova Scotia who has a discretionary exemption)for Cabinet confidences.

69.1(1) as is.

(a) all proceedings under this Act in respect of the **information**, including an investigation, appeal or judicial review, are discontinued;

(b) as is.

(c) as is

Section 69.1 [Certificate under s. 38.13 Canada Evidence Act]

The current Act provides that where a certificate under s. 38.13 of the **Canada Evidence Act** is issued in respect of requested information after the filing of a complaint, all proceedings under the Act in respect of the complaint are discontinued. The amended version of this provision states that all proceedings in respect of the information are discontinued. The amendment preserves the requester's rights under the Act in respect of any requested information that is not subject to a s. 38.13 certificate. This distinction is important in cases in which a requester has asked for records that contain both s. 38.13 and non-s. 38.13 information. This amendment is identical to the current wording in the corresponding **Privacy Act** provision.

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69.1 (1) Where a certificate under section 38.13 of the Canada Evidence Act
prohibiting the disclosure of information contained in a record is issued before a
complaint is filed under this Act in respect of a request for access to that
information, this Act does not apply to that information.

(2) Notwithstanding any other provision of this Act, where a certificate under
section 38.13 of the Canada Evidence Act prohibiting the disclosure of information
contained in a record is issued after the filing of a complaint under this Act in
relation to a request for access to that information,

(a) all proceedings under this Act in respect of the complaint, including an
investigation, appeal or judicial review, are discontinued;

(b) the Information Commissioner shall not disclose the information and shall take
all necessary precautions to prevent its disclosure; and

(c) the Information Commissioner shall, within 10 days after the certificate is
published in the Canada Gazette, return the information to the head of the
government institution that controls the information.
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O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion paper: No comments

70.(1)(a) – (d) as is.

(e) collect statistics appropriate to an annual assessment of the government's performance under this Act, including, without limiting the generality of the foregoing,

(i) the percentage of requests received that were answered within 30 days;
(ii) the percentage of requests received that were deemed to have been refused pursuant to subsection 10(3);
(iii) the percentage of requests in respect of which an extension of 60 days or more was claimed;
(iv) the percentage of requests granted in full, granted in part and denied in full;
(v) the costs directly attributable to the administration of this Act; and
(vi) the amount of fees collected and waived.

Section 70 [Duties of designated Minister]

This addition to section 70 works in tandem with s. 72(1). The current Act requires that the head of every government institution prepare an annual report to Parliament on the administration of the Act during each financial year. The amended s. 72 requires the production of only one report - to be submitted by the designated Minister. This report must contain the elements listed in s. 70(1)(e), all of which are designed to enable Parliament, the Commissioner, the government and the public to assess the overall "health" of the access to information program.

70.(1) Subject to subsection (2), the designated Minister shall

(*a*) cause to be kept under review the manner in which records under the control of government institutions are maintained and managed to ensure compliance with the provisions of this Act and the regulations relating to access to records;

(*b*) prescribe such forms as may be required for the operation of this Act and the regulations;

(*c*) cause to be prepared and distributed to government institutions directives and guidelines concerning the operation of this Act and the regulations; and

(*d*) prescribe the form of, and what information is to be included in, reports made to Parliament under section 72.

O/S: recommended that government institutions continue to table their Annual Reports in Parliament but the Treasury Board Secretariat should prepare "consolidated annual reports" on both acts to be tabled in Parliament (p. xvi)
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: recommended that Treasury Board Secretariat develops performance measurements indicators, that institutions' annual reports be expanded and that TBS aggregate reports provide a much broader view. (p. 151-155, Rec 10-1 – 10-4
ICSR: those good recommendations fall short of what is needed; the duties of the designated minister should be expanded and annual reports should offer a statistical picture of the overall performance. (p. 30-31)
C-201: no reference
MFP: no reference

Discussion Paper [p.40]

- “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.”

Federal Accountability Act

70 (1) (c.1) cause statistics to be collected on an annual basis for the purpose of assessing the compliance of government institutions with the provisions of this Act and the regulations relating to access; and (s. 161, in force)

71.(1) The head of every government institution shall provide public access, at the locations set out below, to any manuals used by employees of the institution in administering or carrying out programs or activities of the institution that affect the public:
(a) the headquarters of the institution;
(b) if reasonably practicable, the offices of the institution, and
(c) the institution's website.

Section 71(1) [Access to manuals]

The amendment to s. 71(1) would add the requirement that a government institution provide access to manuals on its Internet website, in addition to providing access at the headquarters and/or offices of the institution. Given the easy access to documents enabled by the Internet, public access to the institution's manual via Internet would considerably enhance public access to and awareness of the manuals.

71.(1) The head of every government institution shall, not later than July 1, 1985, provide facilities at the headquarters of the institution and at such offices of the institution as are reasonably practicable where the public may inspect any manuals used by employees of the institution in administering or carrying out programs or activities of the institution that affect the public.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper: No comments

72.(1) The designated minister shall prepare for submission to Parliament an annual report on the administration of this Act by government institutions and on the discharge of the obligations set out in subsection 70(1).

Section 72 [Report to Parliament]

See section 70.

72.(1) The head of every government institution shall prepare for submission to Parliament an annual report on the administration of this Act within the institution during each financial year.

see references for s. 70 [Duties of designated Minister]

Discussion Paper: No comments

Federal Accountability Act

72.1 The head of a department or a ministry of state of the Government of Canada shall publish an annual report of all expenses incurred by his or her office and paid out of the Consolidated Revenue Fund. (s. 162, in force)

72.1 Where it is not reasonably practicable to give notice to a person in the manner specified by a provision of this Act, notice may be given in a substitute manner if it is reasonable to expect that the contents of the notice will thereby be brought to the attention of that person.

Section 72.1 [Non-individualized notice]

This new provision permits substitute notice where it is not reasonably practical to comply with the notice requirements currently set out in the Act. An example would be where there are a large number of third parties to be notified and it would be prohibitively expensive to provide notice via the traditional method of individualized written notice. In such cases, notification through a specialized trade association or publication could be considered.

(new provision)

O/S: recommended that the Act be amended to allow substitutional service or notification by means of notice in the Canada Gazette and advertisement in any relevant trade journal, periodical or newspaper where many third parties are involved or such parties reside outside of Canada (p. 27-28)
S/A: the government will amend the Act to allow for third party notice to be accomplished through advertisements in newspapers and trade journals (p. 34-35)
IC93-94: allow for non-individualized third party notice where reasonable (p. 20-21)
IC00-01: same as IC93-94 (p.74-76)
TF: allow for non-individualized notice to third parties where there is a large number of third parties to notify (p. 61)
ICSR: same as IC93-94 (p. 66-67)
C-201: no reference
MFP: no reference

Discussion Paper: No comments

73. The head of a government institution shall, by order, designate an Open Government Coordinator for that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order and may, by order, delegate to other officers or employees of the institution the powers necessary to assist the open government coordinator.

Section 73 [Open Government Coordinator]

See s. 3 - definition of "Open Government Coordinator"

This section would require that the principal delegate of the head of a government institution under this Act would be the Open Government Coordinator. This provision would end the practice in some government institutions of giving little or no delegation of authority to the Access to Information Coordinator in favour of giving such delegation to senior, operational executives.

73. The head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order.

O/S: recommended that the status and role of Access Coordinators be given explicit recognition in s. 73 of the Act; Access Coordinators be officials of senior rank and have direct reporting relationships with senior management (p. 13-15, xiv)

S/A: recognizes the crucial role played by coordinators; coordinators require direct access to senior management (p. 32-33)

IC93-94: no reference

IC00-01: recommended that coordinators be defined in the Act and that s. 73 be amended to set out the duties of the access to information coordinators (p. 62-64)

TF: recommended that role, duties of coordinators be described in more detail in the Access to Information Policy and Guidelines; and articulate responsibilities of head of institutions, Deputy Heads, program managers in meeting their statutory obligations under the Act (p. 185, Rec. 7-10,7-11, 7-12)

ICSR: same as in IC00-01 (p. 55); and their role need to be defined in legislation and made more professional. (p. 32)

C-201: no reference

MFP: no reference

Discussion Paper: No comments

73.1 It is the duty of the head, deputy head and Open Government Coordinator of a government institution to ensure, to the extent reasonably possible, that the rights and obligations set out in this Act are respected and discharged by the institution.

Section 73.1 [Duty to ensure proper discharge of Act]

See s. 3 - definition of "Open Government Coordinator". This new provision specifically allocates responsibility for proper discharge of obligations imposed by the Act to the head and deputy head of a government institution as well as to the Open Government Coordinator. This provision underlines the importance of the duties of the Open Government Coordinator, and ensures that senior management of the government institution also respect and enforce the rights and obligations set out in the Act. This provision is intended to bring home to coordinators that Parliament expects them to be the open government "conscience" of their institutions. This provision is also intended to alert the Head and Deputy Head of government institutions that they will be individually and collectively accountable to Parliament and the public for the manner in which their institutions administer the Act.

(new provision)

See references for s. 73 [Open Government Coordinator]

Discussion Paper: No comments

75.(1) The administration of this Act shall be reviewed every five years by such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established by Parliament for that purpose.

(2) The committee designated or established by Parliament for the purpose of subsection (1) shall, within one year after each review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon, including a statement of any changes the committee would recommend.

Section 75 [Periodic review of Act]

The Act currently provides that the *Access to Information Act* shall be reviewed on a permanent basis. The amendment to s. 75 would set out a review every five years, which would provide a more regular and timely review than is currently required. In addition, the amendment provides that a report to Parliament would be required within a year of each five-year or within such further time as the House of Commons may authorize. These changes would ensure that the Act is reviewed on a regular basis and that it remains current and responsive to the needs of the population.

75.(1) The administration of this Act shall be reviewed on a permanent basis by such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established by Parliament for that purpose.

(2) The committee designated or established by Parliament for the purpose of subsection (1) shall, not later than July 1, 1986, undertake a comprehensive review of the provisions and operation of this Act, and shall within a year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon including a statement of any changes the committee would recommend.

O/S: in favour of review four years after tabling of its report (p. 95-96)
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper: No comments

77.
(f) repeal

(f) specifying classes of investigations for the purpose of paragraph 16(5)(*c*);

Section 77(1)(f) [Regulations]

This is an amendment consequent to the repeal of s. 16(1)(a).

77.(1) The Governor in Council may make regulations
(..)

(*f*) specifying investigative bodies for the purpose of paragraph 16(1)(*a*);

(*g*) specifying classes of investigations for the purpose of paragraph 16(4)(*c*); and

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper: See comments under s.16

77(1)(h)increasing the maximum number of officers or employees designated for the purpose of conducting investigations into complaints resulting from the refusal of government institutions to disclose records by reason of paragraph 13(1)(a) or (b) or section 15;

Section 77(1)(h) [Regulations]

This is an amendment resulting from the change in number of s. 13 and 15 designated investigators as set out in s. 59.

77.(1) The Governor in Council may make regulations
(…)

(*h*) prescribing the procedures to be followed by the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner in examining or obtaining copies of records relevant to an investigation of a complaint in respect of a refusal to disclose a record or a part of a record under paragraph 13(1)(*a*) or (*b*) or section 15.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper: No comments

Federal Accountability Act

70 (1.1) The designated Minister may fix the number of officers or employees of the Information Commissioner for the purposes of subsection 59(2). (s. 161, in force)

[See also section 59(2)]

77(1)(i) adding to the list of aboriginal governments set out in Schedule III, and

Section 77(1)(i) [Regulations]

This is an amendment consequent to the addition of paragraph 13(3)(c). Subsection (3) defines the term "aboriginal government", and provides that an "aboriginal government" includes any entity listed in Schedule III. The Nisga'a Government and Westbank First Nation Council are stated to be "aboriginal governments". Further aboriginal governments may be listed via regulation in Schedule III, and thus repeated changes to the Act will not be necessary in the event that additional aboriginal governments are created.

77.(1) The Governor in Council may make regulations

(*a*) prescribing limitations in respect of records that can be produced from machine readable records for the purpose of subsection 4(3);

(*b*) prescribing the procedure to be followed in making and responding to a request for access to a record under this Act;

(*c*) prescribing, for the purpose of subsection 8(1), the conditions under which a request may be transferred from one government institution to another;

(*d*) prescribing a fee for the purpose of paragraph 11(1)(*a*) and the manner of calculating fees or amounts payable for the purposes of paragraphs 11(1)(*b*) and (*c*) and subsections 11(2) and (3);

(*e*) prescribing, for the purpose of subsection 12(1), the manner or place in which access to a record or a part thereof shall be given;

(*f*) specifying investigative bodies for the purpose of paragraph 16(1)(*a*);

(*g*) specifying classes of investigations for the purpose of paragraph 16(4)(*c*); and

(*h*) prescribing the procedures to be followed by the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner in examining or obtaining copies of records relevant to an investigation of a complaint in respect of a refusal to disclose a record or a part of a record under paragraph 13(1)(*a*) or (*b*) or section 15.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper [p.26]

Proposal submitted to the Committee:

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

77(1)(j) adding to the list of officers or agents of Parliament set out in Schedule II.

Section 77(1)(j) [Regulations]

This is an amendment consequent to the creation of the new Schedule II in s. 16.1 of the Act.

77.(1) The Governor in Council may make regulations

(*a*) prescribing limitations in respect of records that can be produced from machine readable records for the purpose of subsection 4(3);

(*b*) prescribing the procedure to be followed in making and responding to a request for access to a record under this Act;

(*c*) prescribing, for the purpose of subsection 8(1), the conditions under which a request may be transferred from one government institution to another;

(*d*) prescribing a fee for the purpose of paragraph 11(1)(*a*) and the manner of calculating fees or amounts payable for the purposes of paragraphs 11(1)(*b*) and (*c*) and subsections 11(2) and (3);

(*e*) prescribing, for the purpose of subsection 12(1), the manner or place in which access to a record or a part thereof shall be given;

(*f*) specifying investigative bodies for the purpose of paragraph 16(1)(*a*);

(*g*) specifying classes of investigations for the purpose of paragraph 16(4)(*c*); and

(*h*) prescribing the procedures to be followed by the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner in examining or obtaining copies of records relevant to an investigation of a complaint in respect of a refusal to disclose a record or a part of a record under paragraph 13(1)(*a*) or (*b*) or section 15.

O/S: no reference
S/A: no reference
IC93-94: no reference
IC00-01: no reference
TF: no reference
ICSR: no reference
C-201: no reference
MFP: no reference

Discussion Paper: No comments

77.(2) Subject to subsection (3), the Governor in Council shall, by order, add to Schedule I:

(a) all departments and ministries of state of the Government of Canada;

(b) all bodies or offices funded in whole or in part from Parliamentary appropriations;

(c) all bodies or offices wholly- or majority-owned by the Government of Canada;

(d) all bodies or offices listed in Schedule I, I.1, II and III of the Financial Administration Act; and

(e) 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.

Section 77(2) [Additions to Schedule I by Governor in Council]

From the outset of debate on the *Access to Information Act*, there was disagreement about which government institutions should be covered by the legislation. The Act currently applies only to those government bodies listed in Schedule I.

The Task Force noted that there is no obvious rationale or apparent criteria used to determine which bodies should be subject to the Act, and called for a principled approach to coverage under the Act.

In his Response to the Task Force, the Information Commissioner recommended closing the gaps in the Act's coverage by setting out criteria for inclusion and mandating the addition of those bodies to Schedule I.

The proposed amendments set out a coherent rationale for inclusion in Schedule I to the Act. In addition to departments and ministries of state, and entities listed in the schedules to the *Financial Administration Act*, entities would be subject to the Act if they are funded from Parliamentary appropriations, majority-owned by the Government of Canada, or bodies performing functions in federal jurisdiction and relating to health, safety, or protection of the environment. These criteria would ensure that institutions that provide government services and are funded by the public are subject to the Act, and provide a principled approach to inclusion in Schedule I.

77.(2) The Governor in Council may, by order, amend Schedule I by adding thereto any department, ministry of state, body or office of the Government of Canada.

O/S: repeal Schedule I and set out criteria for entities subject to the Act; entities would not be subject to the Act if they are specifically excluded; extend coverage of Act to include all federal government institutions, administrative tribunals, Senate and House of Commons and wholly-owned Crown corporations and their subsidiaries; criteria : "normally perceived by public to be part of institutional machinery of government" OR, alternatively, public institutions exclusively financed from the Consolidated Revenue Fund OR power of appointment/controlled by government; do not extend coverage to judicial institutions or to "personal offices of members of the Senate and House of Commons"; Act should not apply to CBC program material (p. xiv, 8-11)

S/A: extend coverage to Crown corporations & wholly-owned subsidiaries, administrative tribunals, parliamentary bodies and offices and organizations controlled by the government through appointment of directors; disagrees with O/S re: repeal of Schedule I and "exclusion" list

(p. 37)

IC93-94: Act should cover: Special Operating Agencies (SOAs); Crown corporations and wholly-owned subsidiaries; any institution to which the federal government appoints a majority of governing body members; all officers of Parliament; Senate, House of Commons, Library of Parliament; exclude offices of Senators and Members of Parliament (p. 26-27)

IC00-01: Cabinet should be placed under a mandatory obligation to add qualified institutions to Schedule I; articulate the criteria for inclusion in Schedule I in the Act; the addition or non-addition of a government entity in Schedule I could be challenged before the IC, and the Federal Court on *de novo* review (p. 54-55)

TF: additions to Schedule I to be made by Governor in Council (as per 77(2)); Act should apply to entities meeting the criteria set out in the Act, relating to government ownership and control and exercise of certain public functions; Act should apply to the House of Commons, Senate, Library of Parliament (excluding information protected by parliamentary privilege, political parties' records and the personal, political and constituency records of individual Senators and Members of the House of Commons); Act should also apply to Offices of the Auditor General, Commissioner of Official Languages, the Information and Privacy Commissioners (p. 21-30, Ch. 2)

ICSR: TF is too conservative in its approach: notes that O/S recommended bringing all Crown corporations under the purview of the Act (p. 15-16); criticize the recommendations that decisions to include or not an institution is left to the discretion of Cabinet; same as IC00-01 (p. 45-48)

C-201: amends Schedule I to include the following entities: Atomic Energy of Canada; Canada Post Corp.; CBC; Canadian Wheat Board; Export Development Canada; NAC Corp.; Office of the Auditor General; Office of the Chief Electoral Officer; Office of the Commissioner of Official Languages; Office of the Information Commissioner; Office of the Privacy Commissioner (s. 27)

MFP: process to add 10 Crown corps. is underway, but 7 have concerns about their interests; establish criteria for the Crown corporations (and subsidiaries) that should be covered; expand Schedule I to include House of Commons, Senate and Library of Parliament, the five Agents of Parliament (p. 5-10)

Discussion Paper [p.4-7; 42]

- "A determination of which institutions should be covered by the ATIA is generally guided by the perceived objective of the ATIA." "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."

- "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 those instances, alternate mechanisms would be suitable.

- "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." (i.e. Atomic Energy of Canada Limited, s.159 of the *Federal Accountability Act*)

- "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 courts)

- "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" and to determine if the current exemption scheme is sufficient.

- The probable cost must also be considered (between 40 to 45 million dollars annually).

- Institutions which are made subject to the Access to Information Act are also made subject to its companion legislation, and are automatically covered by the Library and Archives of Canada Act. "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."

- "The parliamentary committee, in 1987, also recommended that the Act cover all administrative tribunals, the Senate, the House of Commons (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. The committee did not recommend the inclusion of the judiciary."

Federal Accountability Act

3. "government institution" means
(a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act; (s.141 (2), in force on 2007.09.01)

Schedule I: s.164 deletes from Schedule I the Crown Corporations and their wholly-owned subsidiaries since they will be included under the new definition in section 3 (in force on 2007.09.01)

3.01 (1) For greater certainty, any provision of this Act that applies to a government institution that is a parent Crown corporation applies to any of its wholly-owned subsidiaries within the meaning of section 83 of the Financial Administration Act.

(2) For greater certainty, the Canadian Race Relations Foundation and the Public Sector Pension Investment Board are parent Crown corporations for the purposes of this Act. (s. 142, in force)

77(1)(i) ''prescribing criteria for adding a body or office to Schedule I'' (s.163(2), in force)).

77.(3) The Governor in Council may not add to Schedule I

(a) the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada, or any component part of these institutions; or

(b) the offices of members of the Senate or the House of Commons.

Section 77(3) [Exclusions from Schedule I]

It is important to note that the criteria set out above would capture offices of MPs and senators as well as the Supreme Court, Federal Court and Tax Court. In its 1987 report, the Standing Committee on Justice and the Solicitor General recommended that these bodies be explicitly excluded from the coverage of the Act.

The amended s. 77(3) would exclude from Schedule I the following institutions: the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada, and the offices of Members of Parliament and Senators.

The judicial branch of government, which must adjudicate complaints under the Act and make binding orders thereon, should not be subject to the Act's requirements, nor to the investigative jurisdiction of the Information Commissioner. More importantly, by convention and constitution, court proceedings are open to the public to a much greater degree than are the activities of other institutions of governance.

The offices of Senators and Members of Parliament should not be covered by the Act. Their role is mediated through the institutions of party and Parliament. Their decisions and actions do not cry out for accountability in the same way as do those of government ministers or the various institutions of Parliament of which individual members are part.

(new provision)

see references for 77(2) [Additions to Schedule I by Governor in Council]

Discussion Paper: See comments under s.3 ("government institutions") and s.77(2)

7(1)(b)(i) for photocopying a page with dimensions of not more than 21.5 cm by 35.5 cm, **no charge for the first 100 pages** and $0.20 per page **thereafter**

Paragraph 7(1)(b)(i)

The change to the photocopying fee is designed to enhance the right of access by permitting up to 100 pages of photocopied material free of charge.

This approach reflects current practice in many government institutions.

7(1) "Subject to subsection 11(6) of the Act, a person who makes a request for access to a record shall pay (a) an application fee of $5 at the time the request is made; (b) where applicable, a fee for reproduction of the record or part thereof to be calculated in the following manner:
(i) for photocopying a page with dimensions of not more than 21.5 cm by 35.5 cm, $0.20 per page,..."

Discussion Paper: No comments