Information Commissioner of Canada

Commissaire à l'information du Canada

Strengthening the *Access to Information Act* To Meet Today's Imperatives

Appearance before the Standing Committee on Access to Information, Privacy and Ethics

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"Canada surely needs to at least raise its own FOI laws up to the best standards of its Commonwealth partners–and then, hopefully, look beyond the Commonwealth to consider the rest of the world. This is not a radical or unreasonable goal at all, for to reach it, Canadian parliamentarians need not leap into the future but merely step into the present."

Stanley Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context*, September 2008.

Message from the Information Commissioner

The *Access to Information Act* must be strengthened to meet today's imperatives. While it is recognized that the Act is sound in terms of its concept and balance, work is uregently needed to modernize it from a legislative perspective and to align it with more progressive regimes both nationally and internationally. Canadians expect a common set of access rights across jurisdictions.

The document contains a list of specific recommendations that represent an important first step in meeting the challenge of modernizing the Act. The list is by no means comprehensive. The recommendations address only the most pressing matters. They may be categorized under the general themes of Parliamentary review, providing a right of access to all, strengthening the compliance model, public education, research and advice, coverage and timeliness.

The *Access to Information Act* was a birthday gift to the country when it was proclaimed on Canada Day in 1983. Now, more than twenty-five years later, Parliamentarians have a unique opportunity to implement measures to modernize the access to information regime and bring it steadfastly into the 21st century. The work of the Standing Committee on Access to Information, Privacy and Ethics reflects Parliament's understanding of the importance of the Act and its commitment to improve it.

What has transpired since 1983? All provinces and territories have joined early adopters Nova Scotia (1977) and New Brunswick (1978) by implementing increasingly progressive freedom of information laws. On the international front, upwards of 70 countries have adopted right to information laws and another 20 to 30 countries are considering them according to a recent study by the United Nations Educational, Scientific and Cultural Organization.

While it is recognized that the *Access to Information Act* remains sound in terms of its concept and balance, work is needed to modernize it from legislative and administrative

perspectives and to align it with more progressive regimes both nationally and internationally. Canadians expect a common set of access rights across jurisdictions.

The way in which the government conducts business has changed dramatically. Departments and agencies continue to devise innovative ways of delivering their programs and services electronically. New technologies have transformed the means by which information is created, managed and communicated. The volume of information continues to increase exponentially.

Important to ensuring access to all is the implementation of technologically advanced systems to support access functions and the dissemination of information. Electronic request processing and links with institutions' communications and publishing modules should be basic requirements of the infrastructure. Such modernization would facilitate the implementation of a necessary program of proactive disclosure to disseminate information in a cost-effective and timely fashion.

The *Access to Information Act* has rarely been reviewed. The only statutory review was conducted by the Standing Committee on Justice and Solicitor General. In 1987, it issued a report, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. In the report, the Committee asserted that the Act was of "similar significance" to the *Canadian Charter of Rights and Freedoms*. Later the courts would affirm that the rights embedded in access and privacy legislation were fundamental, democratic rights and would recognize the Act's "quasi-constitutional" status.

In his tenth-year anniversary report, Information Commissioner John Grace presented his case for reform. He recognized that "while the Act has served well in enshrining the right to know, it has also come to express a single-request, often confrontational approach to providing information – an approach which is too slow and cumbersome for an information society." Today, most of his forty-three recommendations remain valid candidates for inclusion in a renewed *Access to Information Act*.

In 2002, the Access to Information Review Task Force issued its report entitled, *Access to Information: Making it Work for Canadians*. The comprehensive report made 139 recommendations for legislative, administrative and cultural reform. Nothing came of this report.

Many Private Members' bills have been introduced. They have ranged in scope from amendments to particular provisions of the Act to legislation comprised of sweeping reform measures.

Regardless of the various reform movements, changes to date have been modest. Section 67.1 was added in 1999 to make it an offence to willfully obstruct the right of access. In 2006, the *Federal Accountability Act* (FedAA) made several amendments to the *Access to Information Act*. Changes included codifying the "duty to assist" requesters and expanding the coverage of the Act, notably to remaining Crown corporations and their subsidiaries. Regrettably, the FedAA also created additional exemptions and exclusions applicable to the new institutions.

In 2005, a draft bill, entitled the *Open Government Act*, was tabled before the Standing Committee on Access to Information, Privacy and Ethics. Developed by Information Commissioner John Reid at the request of the Standing Committee, the proposed Act

included substantial changes to the law. A primary objective was to address concerns about a “culture of secrecy” within political and bureaucratic environments. The proposed Act was endorsed by Commissioner Gomery in his Phase 2 report, *Restoring Accountability*. I generally support the draft bill. However, I believe the recommendations outlined in this document should be implemented without further delay.

Recommendations

Recommendation Number 1: That Parliament review the *Access to Information Act* every five years

Recommendation Number 2: That all persons have a right to request access to records pursuant to the *Access to Information Act*

Recommendation Number 3: That the *Access to Information Act* provide the Information Commissioner with order-making power for administrative matters

Recommendation Number 4: That the *Access to Information Act* provide the Information Commissioner with discretion on whether to investigate complaints

Recommendation Number 5: That the *Access to Information Act* provide a public education and research mandate to the Information Commissioner

Recommendation Number 6: That the *Access to Information Act* provide an advisory mandate to the Information Commissioner on proposed legislative initiatives

Recommendation Number 7: That the application of the *Access to Information Act* be extended to cover records related to the general administration of Parliament and the courts

Recommendation Number 8: That the *Access to Information Act* apply to Cabinet confidences

Recommendation Number 9: That the *Access to Information Act* require the approval of the Information Commissioner for all extensions beyond sixty days

Recommendation Number 10: That the *Access to Information Act* specify timeframes for completing administrative investigations

Recommendation Number 11: That the *Access to Information Act* allow requesters the option of direct recourse to the Federal Court for access refusals

Recommendation Number 12: That the *Access to Information Act* allow time extensions for multiple and simultaneous requests from a single requester

Recommendation Number 1

That Parliament review the *Access to Information Act* every five years

Although the *Access to Information Act* requires that the administration of the legislation "shall be reviewed on a permanent basis" by a Parliamentary Committee, the only statutory review undertaken was by the Standing Committee on Justice and Solicitor General in 1986. The Committee issued a comprehensive report entitled, *Open and Shut: Enhancing the Right to Know and the Right to Privacy,* in 1987 and the government responded to it in *Access and Privacy: The Steps Ahead*. There have been reform initiatives since that time but there is currently no provision for scheduled reviews to ensure that the legislation continues to reflect the needs of Canadians in a constantly changing environment.

Establishing regular reviews would yield opportunities to examine and improve practices and harmonize federal legislation with national and international standards. Ultimately, the reviews would foster an enhanced awareness and appreciation of access to information rights within political and bureaucratic spheres and, most importantly, by the public. The *Open Government Act* proposed a review of the administration of the *Access to Information Act* every five years.

Therefore, it is recommended that the Act be amended to require a review by Parliament every five years. This schedule would provide an opportunity for Parliamentarians to identify systemic issues, determine best practices in other jurisdictions and recommend changes to legislative or administrative structures.

Benchmarking

The requirement to review access and privacy legislation on a regular basis has been entrenched in more recent regimes. The federal *Personal Information Protection and Electronic Documents Act* requires that it be reviewed by Parliament every five years. Most provincial and territorial statutes contain similar provisions.

In the United States, the *Open Government Act of 2007* re-enforced the importance of legislative reviews. It states that

> *Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the* Freedom of Information Act*), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the fundamental 'right to know'.*

Recommendation Number 2

That all persons have a right to request access to records pursuant to the *Access to Information Act*

The *Access to Information Act* provides the right to request and receive information held by federal institutions only to Canadian citizens, permanent residents, and individuals and incorporated entities present in Canada. The legislation does not grant universal access. Foreign companies and individuals can obtain indirect access to the same information by engaging Canadian agents or information brokers.

In a recent submission to the Office of the Information Commissioner on how to strengthen the *Access to Information Act*, the Commonwealth Human Rights Initiative stated that the right of access in Canada "falls short" of compliance with a human rights convention. It noted that

> *Canada, as a member of the United Nations, has acceded to* the International Covenant on Civil and Political Rights (ICCPR) *in 1976. Article 19 expressly provides for every human being the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The Organization of American States and the Commonwealth – both of which Canada is a member – have also endorsed minimum standards on the right to information that must be enjoyed by all people. These minimum standards should form the basis for Canada's information access regime.*

Recommendations from previous reviews of the legislation have advocated an amendment providing "any person" with the right of access to records. The *Open Government Act* included a provision that "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."

In an environment of increasing globalization, people will require access to information regardless of their physical presence. From the practical perspective of networked communications and determining eligibility, it is becoming difficult to sustain the concept of limited access. Therefore, it is recommended that the right of access be provided to all.

Benchmarking

The restriction on access is inconsistent with other Canadian and international standards. All provinces and most countries, including Australia, Ireland, Mexico, the United Kingdom and the United States, provide access to all persons regardless of citizenship or geographical location. These jurisdictions report that foreign requests have not resulted in a significant increase in the volume of requests. The major difference is that individuals are permitted to make requests directly rather than through agents.

Recommendation Number 3

That the *Access to Information Act* provide the Information Commissioner with order-making power for administrative matters

The debate surrounding the authorities allocated to Information Commissioners has generally involved the examination of two models–the ombudsman model and the quasi-judicial model. The ombudsman model is based on investigation and moral suasion while the quasi-judicial model provides for order-making powers.

The Commissioner, like other bodies that engage in fact-finding and recommendation making activities, currently has jurisdiction to issue orders in the course of carrying out investigations. This includes confidentiality orders to ensure the privacy of investigations.

It is recommended that a third model be adopted. Put forward by the Standing Committee on Justice and Solicitor General, it retains the advantages of the advisory and informal role played by the Commissioner while facilitating an expeditious resolution of administrative matters. In its report, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, the Committee recommended that the "central mandate of the Information Commissioner and Privacy Commissioner to make recommendations on disclosure be confirmed, but that the power allowing the Information Commissioner to make binding orders for subsidiary issues (relating specifically to delays, fees, fee waivers and extensions of time) be provided in amendments to *the Access to Information Act*."

Benchmarking

The Special Advisor to the Minister of Justice, Justice La Forest, reviewed the issue in his report entitled, *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues*. He acknowledged the success of the Commissioners in Alberta, British Columbia, Quebec, Ontario and Prince Edward Island in settling complaints in a manner satisfactory to all parties by employing a combination of their powers to render final decisions to settle disputes, subject to judicial review, and their practices of resolving cases through conciliation, mediation and other informal means.

Justice La Forest quoted the arguments of the Access to Information Review Task Force in favour of order-making powers:

> *Many users would argue that a Commissioner with order-making powers would provide a more effective avenue of redress for complainants. Under the current system, a complainant who is not satisfied with a recommendation by*

the Commissioner or the government's response must apply for review by the Federal Court. This is both time-consuming and expensive.

Under the full order-making model, the requester receives a more immediate determination. It is more rules-based and less ad hoc than the ombudsman model. Commissioners with order-making powers are tribunals. They issue public decisions, with supporting reasons. This results in a consistent body of jurisprudence that assists both institutions and requesters in determining how the Act should be interpreted and applied. As administrative tribunals, under the scrutiny of courts, they are subject to high standards of rigour in their reasons and procedural fairness.

However, he balanced the argument with cautions that

There is a danger that a quasi-judicial, order-making model could become too formalized, resulting in a process that is nearly as expensive and time-consuming as court proceedings. It is also arguable that the absence of an order-making power allows the conventional ombudsman to adopt a stronger posture in relation to government than a quasi-judicial decision-maker. There is also some virtue in having contentious access and privacy issues settled by the courts, where proceedings are generally open to the public. The ability of both the commissioners and the complainants to resort to the courts may well be seen to be a sufficient sanction for non-compliance, particularly in relation to some of the more sensitive issues arising at the federal level.

Recommendation Number 4

That the *Access to Information Act* provide the Information Commissioner with discretion on whether to investigate complaints

The *Access to Information Act* requires that the Information Commissioner investigate all complaints received and report findings of the investigations. These complaints may be in relation to a broad range of matters relating to requesting or obtaining access under the Act. The Act contains no provision that would grant the Commissioner any measure of discretion to investigate a complaint.

It is recommended that the *Access to Information Act* be amended to allow the Information Commissioner discretion on whether to investigate complaints. Such a provision would enable the Commissioner to exercise a measure of control over the complaint process and the utilization of resources by ensuring they are focused on significant individual requests and public issues. Any decision not to investigate a complaint could be subject to the usual judicial review process.

Benchmarking

Most of the provinces' and territories' freedom of information statutes grant Commissioners an ability to decide not to review some complaints received. Both Alberta's and Prince Edward Island's *Freedom of Information and Protection of Privacy* statutes grant the Commissioner the discretion to refuse to conduct an inquiry where the Commissioner is of the view that either the subject-matter of a request for a review has already been dealt with in an order or investigation report, or other "circumstances warrant refusing to conduct an inquiry." A similar provision is found in Manitoba's legislation.

Other provinces, including Saskatchewan and Quebec, and two of the territories, the Northwest Territories and Nunavut, have statutes that provide further guidance as to when a Commissioner may decide not to review a complaint. With slight variations in wording, these jurisdictions include provisions that enable Commissioners to refuse to review or discontinue a review of a complaint where, for example, the Commissioner is of the opinion that the complaint is trivial, is not made in good faith, is frivolous or vexatious, or amounts to an abuse of the right to access.

Recommendation Number 5

That the *Access to Information Act* provide a public education and research mandate to the Information Commissioner

In 1987, in *Access and Privacy: The Steps Ahead*, its response to a recommendation made by the Standing Committee on Justice and Solicitor General, the government stated:

> *An essential part of making the* Access to Information Act *more effective is to ensure that it is better known and understood by the public. . . The government will also amend the* Access to Information Act *to provide a public education mandate for the office of the Information Commissioner.*

Obtaining access to information in institutional records is critical to the effective participation of citizens in the democratic process. Studies of the *Access to Information Act* consistently re-affirm that Canadians generally lack an awareness and understanding of the rights afforded to them by the legislation. They have also recommended that the legislation be amended to recognize the role of the Information Commissioner in educating the public about the Act and access to government information in general.

The *Open Government Act* included such a proposal and Justice La Forest, in his study of the Offices of the Information and Privacy Commissioners, acknowledged the importance of this function. He stated that "just as there is a need to inculcate access and privacy norms in government, it is also necessary to educate the public about their access and privacy rights and inform them of the threats posed to these rights by various technological, social, and legislative developments."

Providing a mandate for educating the public and conducting research on access rights is fully compatible with the responsibilities of the Information Commissioner. Experiences in other jurisdictions have demonstrated that it poses no risk to the impartiality of the Office. The mandate will help ensure that Canadians are aware of and know how to exercise their rights to information. Ultimately, it promotes informed dialogue and accountability. Therefore, it is recommended that the *Access to Information Act* be amended to provide a public education and research mandate to the Information Commissioner.

Benchmarking

Many Canadian and international access to information laws have incorporated an education and research component that explicitly empowers Commissioners to promote a public understanding of access rights and to conduct research into issues affecting the

public's right to know. As part of the responsibility "for monitoring how this Act is administered to ensure that its purposes are achieved", British Columbia's *Freedom of Information and Protection of Privacy Act* explicitly provides the Commissioner with the mandate to "inform the public about this Act" and "engage in or commission research into anything affecting the achievement of the purposes of this Act."

The federal *Personal Information Protection and Electronic Documents Act* provides an excellent model of a public education mandate. It requires that the "Commissioner shall develop and conduct information programs to foster public understanding," and "undertake and publish research that is related to the protection of personal information." With this mandate, the Privacy Commissioner has achieved admirable results in informing Canadians about their privacy rights with respect to personal information held by private sector organizations and has initiated a comprehensive research program that has produced valuable studies on key privacy issues. The Privacy Commissioner has recommended that the *Privacy Act* be updated to incorporate a similar mandate.

Recommendation Number 6

That the *Access to Information Act* provide an advisory mandate to the Information Commissioner on proposed legislative initiatives

Federal Information Commissioners have generally considered it to be an important part of their role and responsibilities to comment on the potential impacts of proposed legislative initiatives. This function is not explicitly reflected in legislation.

The *Report of the Access to Information Review Task Force* stated:

> *We believe that there are many circumstances in which the Treasury Board Secretariat, or a government institution, would benefit from the advice of the Information Commissioner. For example, advice on proposed legislation, regulations, policies or programs that could have an impact on access to information; advice on guidelines; advice on the administration of the Act in an institution; and advice on information management practices and policies.*

This view was endorsed by Justice La Forest in his report entitled, *The Offices of the Information Commissioner and Privacy Commissioners: The Merger and Related Issues*. He recommended that:

> *The* Access to Information Act *and the* Privacy Act *should be amended to specifically empower the commissioners to comment on government programs affecting their spheres of jurisdiction. Ideally, there should be a corresponding duty imposed on government to solicit the views of the commissioners on such programs at the earliest possible stage.*

The *Open Government Act* proposed providing an advisory mandate to the Information Commissioner. The provision stated that 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 make public comment on the transparency and accountability implications of proposed legislative schemes or government programs."

Therefore, it is recommended that the *Access to Information Act* explicitly recognize the role of the Information Commissioner in providing advice to institutions regarding proposed legislative initiatives. Institutions should be required to notify and consult with

the Commissioner on any legislative matters that may have an impact on the right of Canadians to access government information.

Benchmarking

Many jurisdictions include such a provision in their legislation. Both Alberta's and British Columbia's *Freedom of Information and Protection of Privacy Acts* specifically state that the "Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may … comment on the implications for access to information or for protection of personal privacy of proposed legislative schemes or programs of public bodies."

Recommendation Number 7

That the application of the *Access to Information Act* be extended to cover records related to the general administration of Parliament and the courts

The federal *Access to Information Act* has not kept pace with its provincial, territorial and international counterparts in terms of its coverage of institutions. Notably, it does not currently apply to the Senate, the House of Commons, the Library of Parliament or the judiciary.

In 1986, in *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, the Standing Committee on Justice and Solicitor General recommended that the Act apply to the Senate, the House of Commons, except for the offices of Senators and Members of the House of Commons, and the Library of Parliament. It also referred to the need to protect Parliamentary privileges.

The recommendation was reiterated in the 2002 *Report of the Access to Information Review Task Force, Access to Information: Making it Work for Canadians*. The Task Force also considered a modified redress process to resolve complaints about the handling of requests for these records.

Canadians expect all publicly funded bodies to be publicly accountable under access to information legislation. Therefore, it is recommended that the administrative records of the Senate, the House of Commons, the Library of Parliament and the judicial branch of government be covered by the Act, subject to provisions protecting Parliamentary and judicial privileges.

Benchmarking

Jurisdictions such as Alberta, Newfoundland and Labrador, the United Kingdom, Australia and Ireland include Parliament in the coverage of their legislation. Parliamentary privilege exemptions and provisions to exclude personal, political and constituency records are provided in various forms. Offices of Parliamentarians are not covered by the Acts. The *Freedom of Information Act 2000* in the United Kingdom provides that information is exempt if this “is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.”

Court administration records should be available under access legislation. In jurisdictions such as Alberta and British Columbia, the Acts apply to all records “including court administration records.” Exclusions are provided for records in court files, for the records of judges and for personal notes, communications or draft decisions of persons who are acting in a judicial or quasi-judicial capacity.

Recommendation Number 8

That the *Access to Information Act* apply to Cabinet confidences

The *Access to Information Act* does not apply to confidences of the Queen's Privy Council for Canada which includes Cabinet records and records of Cabinet committees. The Act provides a representative list of types of documents that constitute a confidence. Once a decision has been rendered that a record is a confidence, it cannot be reviewed either by the Information Commissioner or by the Federal Court. However, the exclusion does not apply where the records have been in existence for more than twenty years or to discussion papers, if the decisions to which the papers relate have been made public or four years have passed since the decisions were made.

The role of Cabinet in a Westminster system of Parliament and the need to protect the Cabinet decision-making process are well understood. However, experience in other provincial, territorial and international jurisdictions with Westminster-style governments has demonstrated that the deliberations and decisions of Cabinet can be properly protected without excluding them from the purview of the legislation.

The *Open Government Act* proposed amending the *Access to Information Act* to provide that confidences of the Queen's Privy Council for Canada be subject to a mandatory exemption from disclosure. It set out a substantive definition of Cabinet confidences. It included information, the disclosure of which would reveal the substance of deliberations of Council or the substance of deliberations between or among ministers. The general definition would remain current in the event of changes to the Cabinet paper process and to the nature and types of records. As with other exemption provisions, a refusal to disclose would have been subject to an investigation by the Information Commissioner and review by the Federal Court. This approach would fulfill the principle of the Act that decisions on the disclosure of government information should be reviewed independently of government.

The status of Cabinet confidences has been under constant debate since the inception of the legislation. Although there have been variations on the theme of how the issue should be resolved, the majority of reports have recommended that confidences be treated as exemptions rather than exclusions. Therefore, it is recommended the *Access to Information Act* apply to Cabinet confidences as discretionary exemptions.

Benchmarking

Most Canadian jurisdictions have exemptions rather than exclusions for Cabinet records. The exemptions are time-limited with periods ranging from ten to twenty-five years. In addition, most laws do not specify document types but focus on information that would reveal the "substance of deliberations" of Cabinet. This concept is contained in the laws of Alberta, British Columbia, Ontario and Prince Edward Island. Alberta and British

Columbia also provide for a public interest override, while Ontario provides for a limited public interest override.

In New Zealand, the *Official Information Act 1982* provides a very broad definition of what constitutes official information for the purposes of the Act. Official information means “any information held by a Minister of the Crown in his official capacity.” In addition, New Zealand encourages the practice of proactive disclosure of Cabinet documents. In a speech entitled, *The Official Information Act and Privacy: New Zealand's Story* at the FOI Live 2005 Conference in London in June 2005, Marie Shroff, Privacy Commissioner of New Zealand and former Secretary of the New Zealand Cabinet, stated

> *I have reserved to the last in this list of practical measures the technique of proactive release. Look at any New Zealand government or state sector website and you will find the full text of Cabinet papers and Cabinet decisions and sometimes endless lists of discussion documents on highly sensitive matters of government policy, usually seeking public submissions. Treasury and the Ministry of Transport, for example, have recent Cabinet papers on their websites: Transport about a major roading decision; and Treasury about a savings package which was an important part of last month’s 2005 budget.*

Recommendation Number 9

That the *Access to Information Act* require the approval of the Information Commissioner for all extensions beyond sixty days

The time limit for responding to an access to information request is thirty calendar days following receipt of the request. The limit can be extended "for a reasonable period of time" if the request involves processing a large volume of records, which would interfere with the operations of the institution, if external consultations cannot be completed within thirty days, or if third party notification requirements must be accommodated.

Institutions must notify the Information Commissioner of all extensions greater than thirty days. There are no limitations on the length of extensions and no prescribed criteria for what constitutes "reasonable." Institutions do not universally comply with the requirement to notify the Commissioner of extensions. Although institutions are considered to be in a "deemed refusal" when time limits are exceeded, the *Access to Information Act* does not contain penalties or sanctions in such situations.

In principle, extensions should be required only in exceptional cases and should not unduly impede the release of information to requesters. The Commissioner's *Report Cards: Systemic Issues Affecting Access to Information in Canada 2007 –2008* examined the increasing use of extensions, as well as the length of extensions taken. It notes that the "lack of checks and balances needed to make sure the system is not being abused and that all institutions using extensions are doing so for legitimate and documented reasons" is of concern to this Office.

Greater oversight is required to ensure that extensions do not undermine the timely release of information. Detailed criteria and tests should be developed to assist institutions in determining what constitutes a reasonable period of time. Therefore, it is recommended that the legislation be amended to include a provision requiring the approval of the Information Commissioner for any extension that is greater than sixty days beyond the initial thirty-day limit. Finally, institutions which are deemed to have refused access to information should forfeit the entitlement to charge fees.

Benchmarking

Many jurisdictions prescribe processes whereby public bodies may obtain extensions to initial time limits. Newfoundland and Labrador and Saskatchewan allow for maximum extensions of thirty days. Quebec permits an extension for a maximum of ten days. Extensions of thirty days or more may be granted with the permission of the Commissioners in Alberta, British Columbia, Manitoba, Nova Scotia and Prince Edward Island.

In the United States, institutions that have not responded to requests within the specified twenty days are limited with regards to assessing fees. They cannot charge search fees

or, where the request originates from the media or educational or scientific institutions, duplication fees unless there are unusual or exceptional circumstances surrounding the processing of the request. The *Freedom of Information Act* also includes a provision that allows applicants to request expedited processing if they are able to demonstrate a "compelling need".

Recommendation Number 10

That the *Access to Information Act* specify timeframes for completing administrative investigations

The *Access to Information Act* does not impose specific time limits on the Information Commissioner to investigate administrative complaints. In addition, once an investigation has been initiated, institutions often experience difficulties in responding quickly with the necessary documentation and representations. As a result of these factors, complainants can become frustrated by the failure to resolve their complaints in a timely manner.

The proposed *Open Government Act* suggested that "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 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 provides an anticipated date for the completion of the investigation."

The Access to Information Review Task Force noted that provincial Commissioners had informed it that time limits had proven adequate to conduct their investigations. It also remarked that both the Office of the Information Commissioner and institutions would have to adjust their processes and be appropriately resourced to adhere to time limits on investigations. Therefore, it is recommended that the *Access to Information Act* be amended to specify a ninety day timeframe for completing administrative investigations.

Benchmarking

Citing a combination of legislative provisions in Alberta, British Columbia and Manitoba, the Task Force recommended that:

> *[T]he Act be amended to require the Information Commissioner to complete investigations within 90 days, with the discretion to extend this period for a reasonable time if necessary, on giving notice of the extension to the complainant, the government institution involved and any third party.*

Recommendation Number 11

That the *Access to Information Act* allow requesters the option of direct recourse to the Federal Court for access refusals

The *Access to Information Act* does not provide a mechanism by which complainants have direct access to the Federal Court with respect to access refusals. Instead, before a complainant can ask the Federal Court to review a government head's decision to refuse access to requested records, the Information Commissioner must complete his investigation.

For some requesters the two-stage review set out in the Act is contrary to the principle of timely access to requested records. Depending upon such factors as the complexity of the issues raised and the number of exemptions claimed, it is not always possible for the Commissioner to complete his investigation of complaints concerning access refusals within an expedited timeframe. Accordingly, the time required to obtain a binding resolution of a complaint can be excessive. Therefore, it is recommended that complainants have the option of direct recourse to the Federal Court for access refusals.

Benchmarking

Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* provides requesters with a choice. The requester may decide to appeal directly to the court. If the requester chooses to appeal directly to the court, he or she cannot ask the Commissioner to review the decision.

An alternative approach would be to allow a complainant to bring a judicial review application directly to the Federal Court where the complaint concerns an access refusal and the complainant has not received the Information Commissioner's report of finding within a specified time.

Recommendation Number 12

That the *Access to Information Act* allow time extensions for multiple and simultaneous requests from a single requester

The *Access to Information Act* gives heads of federal institutions the possibility of extending time limits beyond the initial thirty days to respond to access requests for a reasonable period of time if certain situations present themselves. One of the situations occurs when the request is for a large number of records or requires a search through a large number of records and meeting the original time limit, under either of these circumstances, would unreasonably interfere with the operations of the institution.

As it currently stands, the provision for extending time limits cannot be applied to situations where responding to multiple and simultaneous requests from the same applicant interferes with the operations of a government institution. This means that considerable resources can be devoted toward the same requester with no possibility for extending the period of time in which multiple and simultaneous requests are to be responded to.

The *Open Government Act* proposed amending the *Access to Information Act* by substituting a provision that stated that time limits could be extended for a reasonable period of time if "meeting the original time limit would unreasonably interfere with the operations of the government institution and the request is for a large number of records, necessitates a search through a large number of records, or is part of a group of requests for a large number records made by the same person on the same subject within a period of thirty days."

To best ensure that the access rights of all requesters are adhered to, it is recommended that government institutions have the option of claiming time extensions when responding to multiple and simultaneous requests from the same requester would unreasonably interfere with their operations.

Benchmarking

The freedom of information legislation in four Canadian provinces allows for extensions to time limits to respond to multiple requests from the same person. In Saskatchewan, an extension of the time limit for an additional reasonable period is permitted when the application is for access to a large number of records or necessitates a search through a large number of records or there is a large number of requests and completing the work within the original timeframe would unreasonably interfere with the operations of the government institution.

The legislation in both Alberta and Prince Edward Island includes a provision allowing for extensions to time limits, with the Commissioner's permission, "if multiple concurrent

requests have been made by the same applicant or multiple concurrent requests have been made by two or more applicants who work for the same organization or who work in association with each other."

In British Columbia, the Commissioner grants extensions of time limits to government institutions "if the commissioner otherwise considers that it is fair and reasonable to do so, as the commissioner considers appropriate." Multiple concurrent requests by the same requester could plausibly represent a situation where the Information Commissioner would consider it appropriate to grant such an extension.

Outside Canada, one jurisdiction where limited time extensions are permitted in similar circumstances is Ireland. When compliance with the original time limit of two weeks after receipt of a request is not reasonably possible because the request relates to a large number of records or because numerous requests relating to the records have already been made, the head of a government institution has the option of extending the period up to a maximum of four weeks.