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

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October 21, 2020

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Dear Mr. Orsborn,

Thank you for your letter dated October 5, 2020, in which you invited me to provide a submission to your committee on the five-year review of the *Access to Information and Protection of Privacy Act*. I read with much interest your terms of reference document and commend both its concision and the far-reaching audience it seeks to consult.

As you may know, there is also a legislative review currently underway at the federal level, for which I am in the final stages of preparing my submission on how to improve the access system. This document will be available on my website later this fall, and I think you will find it of interest for your purposes. Once it is available, I will be sure to send you a copy. Certainly, I can already tell you that I think the Treasury Board Secretariat's review should address timeliness, take a thorough look at the exemptions and exclusions; and keep the focus on transparency. Such legislative reviews exercises should not remove the focus from the continuous need for strong leadership on access matters within government, as well the use of best practices, procedures and technology to deliver access more efficiently. All of which, may be acted upon immediately, without the need for legislative changes.

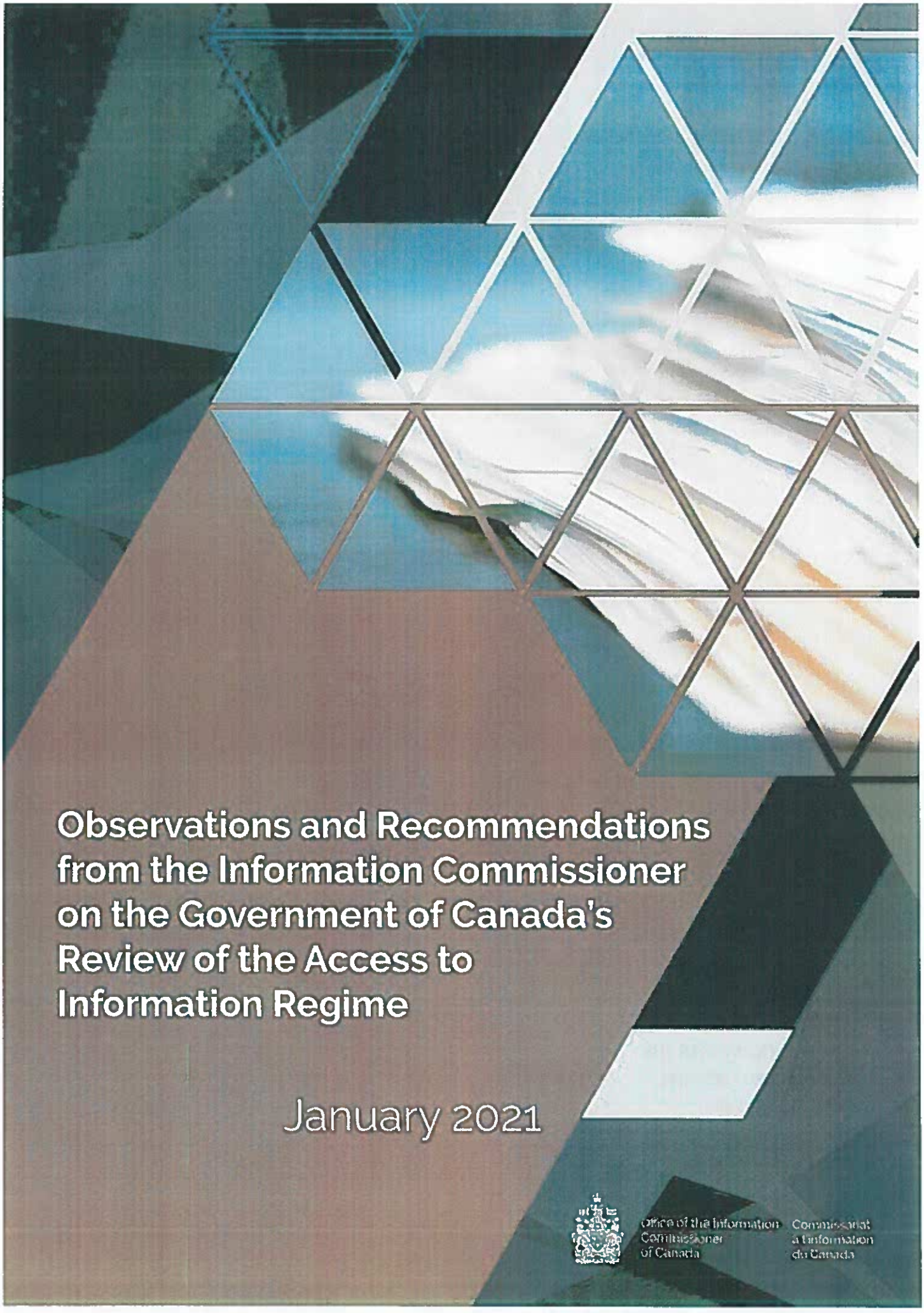
I have also taken the opportunity in recent months to comment on the context in which the access world finds itself due to the COVID-19 pandemic. In particular, I have sought to remind leaders in the federal government that the right of access has not been suspended due to the pandemic, and that in fact, with such major decisions being taken so frequently, it is even more important to be transparent. I invite you to review my representations on this matter from April 10, 2020, April 28, 2020 and July 10, 2020.

One of my main preoccupations is ensuring that government institutions have appropriate decision-making documentation safeguards and practices in place. If the government is to inspire the confidence in Canadians that will be required to successfully navigate this challenging period as a nation, timely decision-making and the proper documentation of both the decisions and any resulting actions must go hand-in hand.

Please accept my best wishes in the fulfillment of your mandate. I would be pleased to appear before your committee for further discussion.

Yours sincerely,

Caroline Maynard
Information Commissioner of Canada



Observations and Recommendations from the Information Commissioner on the Government of Canada's Review of the Access to Information Regime

January 2021

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Commissariat à l'information du Canada

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Table of contents

Message from the Commissioner

The June 2019 amendments to the *Access to Information Act* provide for a review of the Act within one year after which they came into force and every five years thereafter. Last summer, the president of the Treasury Board announced a review of the entire access to information regime. The scope of this review goes beyond the review required by the Act and is an excellent opportunity for the government to address what numerous stakeholders, as well as many of my predecessors and I, have been requesting for a long time: a fundamental reform of the access to information regime.

To get there, real leadership will be needed to solve a number of problems affecting the regime and ensure that it complies with the principles of openness and transparency safeguarded by the Act. This document sets out practical measures that go beyond the statutory framework. It also makes observations and recommendations on how to improve the access regime. My recommendations, which draw on over 35 years' experience investigating complaints, are far from exhaustive. I chose them because I believe that they are a good starting point for dealing with the recurring problems currently affecting the access regime and because they will have a real impact.

This review is an excellent opportunity for the government to make the changes needed to enhance institutions' transparency. The broader review parameters announced by the President of the Treasury Board Secretariat are a step in the right direction.

Caroline Maynard

Introduction

As part of the review of the federal government's access to information regime launched in June, Minister Jean-Yves Duclos, President of the Treasury Board Secretariat, has sought my input and recommendations.

In particular, he has specified that the review would cover three key elements:

- a review of the legislative framework;
- opportunities to improve proactive disclosure and to make more information openly available; and
- an assessment of processes and systems to improve service and reduce delays.

In response to his request, part 1 of this document will present my observations on how to improve Canada's access to information regime and protect its integrity. These observations will cover four fundamental areas in which immediate, concrete measures are needed. They will address, among other things, the last two elements mentioned above.

The second part will deal with the review of the legislative framework.

Part I – Improving the access to information regime

Times of crisis often exacerbate and reveal a system's weak links. The current pandemic is no exception as it has highlighted the weak links in the federal access to information regime.

The access regime had already entered a critical phase before the pandemic and could soon be beyond repair if certain serious problems are not resolved, in particular:

1. Inadequate leadership and a lack of clear guidelines on transparency and disclosure expectations;
2. a pressing need to innovate and to allocate enough resources to the access regime;
3. the necessity to properly document decisions and to efficiently manage institutions' information; and
4. the declassification of records in a timely manner.

Addressing these areas is essential if the access regime is to work properly, and they require as much immediate attention from the government and heads of government institutions, as does the legislative review.

1. Inadequate leadership and a lack of clear guidelines on transparency and disclosure expectations

For the access regime to work properly, senior government leaders and heads of government institutions will have to show strong leadership and make a clear commitment to promoting transparency and the disclosure of information. This leadership is essential in bringing about a cultural shift within the government and requires the following:

- Take every necessary measures to ensure that government institutions respect the existing legislation. As Treasury Board Secretariat statistics and the many complaints dealt with by the Office of the Information Commissioner (OIC) show, this is often not the case.

- Be transparent from the outset and disclose more information voluntarily and independently of the legal obligation of proactive publication, since this is the basis of an open government. The voluntary publication of more information, especially information of public interest, should be standard practice and should be strongly encouraged. More transparency would also allow Canadians to better understand the government's decisions and policies, and would enhance accountability.

- Adopt optimal information management practices.

- Ensure that institutions immediately take the measures needed to review and improve their access to information process in order to reduce response times. In addition to legislative amendments, the culture of complacency and the downplaying or tolerance of delays must end.

Only a tangible commitment to openness and transparency at the highest level will generate the necessary engagement within institutions to bring about profound impacts on access to information.

2. A pressing need to innovate and to allocate enough resources to the access regime

The access regime continues to experience increasingly apparent difficulties, particularly because of the lack of qualified staff to deal with access requests and institutions' use of archaic methods for processing, managing and sending information.

- Many access to information and privacy (ATIP) teams are in critical need of additional qualified staff. The government has to adequately invest in human resources, by creating pools, hiring sufficiently qualified staff and developing appropriate ongoing training for employees.

- Institutions are not taking sufficient advantage of new technology. Innovating and using adapted technological tools would result in more efficient use of financial and human resources.

New technology could also be used to gather operational statistics on access from institutions. Regularly updated statistics would provide a more accurate picture of the access regime and the challenges faced by institutions, and thereby make it possible to address these challenges more quickly. In Scotland, statistics are gathered every three months through a computer system rather than compiled once a year in an annual report; this allows them to promptly assess trends and institutions' performance. This method of data collection also makes it possible to take action quickly and as needed, something that is not possible in our current access regime.

3. The necessity of properly documenting decisions and efficiently managing institutions' information

The right of access is contingent on two factors: institutions' properly documenting their key actions and decisions, and the retention of these records.

The right of access cannot exist without records. Even though we have government policies and directives establishing frameworks for documenting the government's key actions, the OIC's investigations show that actions are not always properly documented. Authors of access requests (or requesters) are sometimes told that there are no records concerning a specific action taken by an institution or decision made by that institution. That response implies that the institution did not create any records or that they were destroyed when they should have been kept.

There seems to be two main reasons for the absence of records:

- the use of new communication technology, which complicates information management and the retention of records shared electronically; and

- a lack of stringency in the documenting of key actions and decisions by institutions.

The creation of a statutory duty for public servants and senior officials to create a complete, accurate registry of key actions would strengthen responsibility, transparency, good governance and public trust. Such a duty would also be in line with one of the main objectives of the Act, institutional accountability.

The government could look to successful legislative models abroad, such as those of the United States, New Zealand and some Australian states.

Properly managing information related to key actions is essential to efficiently respond to access requests. In its investigations, the OIC has noted information management deficiencies, mainly resulting from the duplication of records, copies and versions and emails being kept on more than one platform, making it hard to retrieve records and process requests. The emergence of new technology, such as instant messaging, which institutions are using more and more, has also led to problems.

Regarding the need to document, I would refer you to the joint resolution[1] made by Canada's Information and Privacy Commissioners in 2016. In my view, this resolution is a good summary of the trend towards nil responses to access requests. In this resolution, Canada's commissioners ask their respective governments to legally oblige public entities to document their deliberations, actions and decisions.

4. The declassification of records in a timely manner

The lack of a declassification system (for security designations) in Canada is increasingly affecting the access regime. The security designation of a record does not determine whether that record warrants being withheld under the Act's national security exemptions (sections 13 and 15). However, it often contributes to institutions' overreliance on these exemptions and exacerbates the time taken to process requests. The OIC currently has 3,800 complaints in its inventory. About 20% of this workload consists of complaints regarding national security exemptions (sections 13 and 15 of the Act).

National security records often become less sensitive over time. A proper declassification system based on regular reviews and consensus by experts would enable researchers and others to gain access to records that are no longer sensitive to national security, through mechanisms other than the Act. This would alleviate pressure on the access to information regime and achieve a better result for all stakeholders.

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[1] Canada's Information and Privacy Commissioners, *Statement of the Information and Privacy Commissioners of Canada on the Duty to Document*, (25 January 2016).

The government should therefore show the same leadership demonstrated by the United States and the United Kingdom and enact a system that declassifies such records when it is reasonable to do so.

In addition to making a general contribution to transparency, responsibility and open government, declassification and the dissemination of Canada's important historical national security and intelligence records benefit the public. For examples of the benefits and a potential path for the development of a declassification strategy, I would invite you to review the document entitled "A declassification strategy for national security and intelligence records".[2]

Part II – Review of the *Access to Information Act*

I will now turn to my recommendations with respect to the review of the Act, which aim to meet the following objectives:

- improve the processing of access requests by better monitoring time limits;
- broaden the scope of the Act to extend access to records of the federal administration;
- augment the scope of independent review of institutions' decisions to refuse access; and
- facilitate the right of access, while limiting the scope of exemptions and exclusions.

I encourage the government to actively pursue these objectives by showing leadership and devoting the time and resources needed to achieve them.

Since the Act's coming into force in 1983, many players, including successive commissioners and various committees and working groups, have repeatedly looked at various elements of the Act. Over the years, many recommendations to improve the Act have been made. Most of these recommendations remain relevant today and are in line with the above-mentioned objectives. I would therefore ask Minister Duclos and his team to review the following reports in particular:

[2] Professor Wesley Wark, *A declassification strategy for national security and intelligence records*, (12 February 2020).

- Making it Work for Canadians by the Access to Information Review Task Force;[3]
- Response to the Report of the Access to Information Review Task Force: A Special Report to Parliament by Commissioner John Reid;[4]
- Strengthening the *Access to Information Act*: A Discussion of Ideas Intrinsic to the Reform of the *Access to Information Act* by the Government of Canada;[5]
- Strengthening the *Access to Information Act* to Meet Today's Imperatives by Commissioner Robert Marleau;[6]
- Striking the Right Balance for Transparency by Commissioner Suzanne Legault;[7] and
- Review of the *Access to Information Act* by the Standing Committee on Access to Information, Privacy and Ethics.[8]

The purpose of this part of the document is not to reproduce everything that can be found in these reports, but rather to identify a selection of amendments most likely to enable the achievement of these objectives, and to have a significant impact on the access to information regime. The recommendations are also based on the OIC's investigation data, which give a unique perspective of the access regime.

Time limits

Recommendation 1
The Act should set out a maximum length of time for consultations needed to respond to access requests.

Access requests must be answered in a timely manner. Information that is outdated or that is no longer relevant because of the time that has elapsed jeopardizes the public's opportunity to participate meaningfully in the democratic process and to hold the government accountable.

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[3] Government of Canada, Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, (June 2002) [*Making it Work for Canadians*].
[4] Office of the Information Commissioner of Canada, Special Report to Parliament, *Response to the Report of the Access to Information Review Task Force: A Special Report to Parliament*, Commissioner John Reid, (September 2002).
[5] Department of Justice, *Strengthening the Access to Information Act: A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act*, (April 2006) [*Strengthening the Access to Information Act*].
[6] Office of the Information Commissioner of Canada, Special Report to Parliament, *Strengthening the Access to Information Act to Meet Today's Imperatives*, Commissioner Robert Marleau, (March 4, 2009).
[7] Office of the Information Commissioner of Canada, Special Report to Parliament, *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, Commissioner Suzanne Legault, (March 2015) [*Striking the Right Balance for Transparency*].
[8] Standing Committee on Access to Information, Privacy and Ethics, *Review of the Access to Information Act*, (June 2016).

Unfortunately, however, the culture of delay that has developed over time persists.[9] Delays in the processing of access requests are one of the major problems of the access regime.

Institutions have to respond to access requests within 30 days of receipt under the Act. Treasury Board statistics show that over the last few years, the number of requests processed within the time limits set out in the Act has decreased by about 14 percent.[10] In 2018–2019, over a quarter of requesters did not receive the requested records within the prescribed time limit.

Fiscal year	Number of access requests processed within time limits (including time extensions)	Percentage of access requests processed within time limits
2014–2015	58,627	87.5%
2015–2016	62,366	85.9%
2016–2017	70,128	80.7%
2017–2018	74,453	76.2%
2018–2019	91,402	73.1%

Furthermore, the percentage of access requests requiring longer response times continues to increase. In 2018–2019, 14,605 requests needed 121 days or more to be processed.

Time needed to process access requests under the *Access to Information Act*, from 2014–2015 to 2018–2019

Processing time	2014–2015	2015–2016	2016–2017	2017–2018	2018–2019
From 0 to 30 days	65.1%	64.1%	64.5%	55.4%	55.8%
From 31 to 60 days	19.6%	21.3%	18.0%	22.6%	24.6%
From 61 to 120 days	8.0%	7.5%	9.5%	11.1%	8.0%
121 days or more	7.3%	7.1%	8.0%	10.9%	11.7%*

*This represents an increase of 4.4 percent over five fiscal years.

[9] *Striking the Right Balance for Transparency*, *supra* note 7 at 27 (for examples of the culture of delay).
[10] Treasury Board of Canada Secretariat, Access to Information and Privacy Statistical Report for the 2018 to 2019 Fiscal Year [*TBS Statistical Report for the 2018–2019 Fiscal Year*].

Since the Act came into effect in 1983, the OIC has investigated thousands of complaints regarding delays in the processing of access requests and time extensions, and it continues to receive them in the thousands.

It is therefore essential to address the problem of access request processing delays. Based on what I have seen in my investigations, this issue is particularly critical when institutions consult other institutions in order to respond to an access request. The Act provides that when consultations make it unreasonable to respect the 30-day time limit, institutions may extend the time limit, provided that the extension is reasonable in the circumstances. However, the absence of time limits for responding to consultations in the Act is one of the reasons for delay regularly invoked by institutions when responding to access requests.

The percentage of time extensions used to consult other institutions continues to increase from one fiscal year to the next. In 2018–2019, extensions to consult accounted for 48 percent of all time extensions.

Indeed, the OIC's investigations have revealed the following:

- Even though under the Treasury Board Secretariat's Interim Directive on the Administration of the *Access to Information Act*[11] institutions must give the same importance to consultation requests as access requests, consulted institutions generally prioritize responding to access requests that they have received, over responding to consultations from other institutions.
- Institutions establish broad standards for responding to consultation requests amongst themselves. Generally speaking, these standards are solely based on the number of pages at issue in the consultation. The establishment of such standards means that institutions are failing to consider the type of exemption, the sensitivity of the information, and the contents or age of records when setting a reasonable time limit for responding to consultation requests.

Institutions' late responses to consultation requests result in significant delays in the processing of access requests. It is important to understand that as long as a consultation is under way, institutions generally will not respond to an access request, even though there is nothing to stop them from doing so under the Act. Consultations with other institutions are not mandatory. It is up to the institution processing an access request whether or not to consult.

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[11] Treasury Board of Canada Secretariat, *Interim Directive on the Administration of the Access to Information Act*, (May 5, 2016) at para 7.7.2.

However, the OIC's investigations show that institutions rarely decide to disclose information without having a consultation when the information concerns other institutions. As a result, requesters are frequently denied timely access to requested records, in whole or in part.

The Act should provide a clearer process for institutions that decide to have a consultation and set out a maximum length of time for consultations required in order to respond to access requests. Requiring consulted institutions to respond within a specific time frame would help reduce processing times for access requests.

Broaden the application of the *Access to Information Act*

Recommendation 2
Agencies to whom the government has outsourced the delivery of programs, that provide government services or that carry out activities of a governmental nature should be subject to Part I of the Act.

Recommendation 3
The Offices of the Prime Minister and Ministers should be subject to Part I of the Act.

As Commissioner Legault noted, government management and administration have undergone and continue to undergo major transformations.[12] Increasingly, the government is transferring some of its public services and government functions to private sector agencies or to organizations it creates with various organizational structures and often at arm's length from government.

However, these agencies or organizations fall outside the application of the Act, which makes it difficult, if not impossible, to access information relating to the administration of federal services and the exercise of public functions entrusted to them by the government. The OIC's investigations show that when requesters attempt to obtain this information from government institutions, they are denied access on the grounds that the records are "not under the control" of the institutions, but of the agencies or organizations in question.

In the interests of transparency and accountability, it is therefore necessary to allow requesters to continue to have access to information by broadening the scope of the Act to make it at a minimum applicable to agencies or organizations:

[12] *Striking the Right Balance for Transparency, supra* note 7 at 8.

- to whom the government has outsourced the delivery of programs;
- that provide government services through the private sector;
- that carry out activities of a governmental nature.

For the same reasons, the Offices of the Prime Minister and Ministers should also be subject to the Act. The records they hold should be accessible to the public, with the exception of those of a personal or political nature.

It is true that the Prime Minister's Office (PMO) and Ministers' offices are now required to publish information under Part II of the Act. This information includes:

- mandate letters;
- all briefing materials for the new ministers;
- title of memorandum prepared for ministers;
- information on the use of public funds (travel and hospitality expenses, contracts over $10,000, expenses incurred by a minister's office; and
- Question Period notes and briefing materials relating to appearances before parliamentary committees.

Ministers' offices have other records relating to their administration and the decisions they make that are not covered by Part II of the Act. It is important to provide the public with access to records that are of interest to them, not just those that are proactively made available to them. Records that are not of a personal or political nature should therefore be accessible to the public under Part I. The PMO and Ministers' offices should therefore be subject to this part of the Act.

Limiting exemptions and exclusions

Personal information

Recommendation 4
The Act should allow heads of government institutions to provide access to personal information where disclosure does not constitute an unwarranted invasion of privacy.

Recommendation 5
The Act should allow heads of government institutions to provide a deceased person's spouse or close relatives access to their personal information on compassionate grounds.

Recommendation 6
The Act should permit the disclosure of a person's business or professional contact information.

Subsection 19(1) of the Act requires that information that meets the definition of "personal information" within the meaning of the *Privacy Act* be exempt from disclosure. Subsection 19(2) of the Act provides an exception to the general prohibition against disclosure of personal information.

Section 19 is the most widely used exemption in the Act. In 2018-2019, institutions invoked this exemption in 42% of access requests, or 52,374 times.

I reiterate the submissions I made in September 2019 to the Department of Justice Canada regarding the review of the *Privacy Act*.[13] These recommendations seek to strike a balance between the right of access and privacy rights.

Unjustified invasion of privacy test

Some information that meets the current definition of "personal information" may not always warrant protection in some specific circumstances where the disclosure would not constitute an "*unjustified invasion of a person's privacy*." Taking into account the particular circumstances and context of the information in question ensures the protection of sensitive personal information, and maximum disclosure of non-sensitive personal information.

Most provincial and territorial access to information and privacy laws in Canada (except Saskatchewan and Quebec) provide for circumstances where the personal information exemption does not apply when the disclosure of the information would not constitute an "unjustified invasion of privacy".

[13] Office of the Information Commissioner of Canada, *Privacy Act review – Information Commissioner Submission to the Department of Justice*, Commissioner Caroline Maynard, (September 2019).

In Ontario, the *Freedom of Information and Protection of Privacy Act* lists a series of non-exhaustive circumstances to be considered by the head of an institution in determining whether disclosure of personal information as a result of an access request constitutes an unjustified invasion of personal privacy. I therefore invite Minister Duclos and his team to review this list for guidance.

Compassionate disclosure

The disclosure of a deceased person's personal information to his or her spouse or a close relative should be allowed when it is warranted for compassionate reasons, as long as the disclosure is not an unreasonable invasion of the deceased's privacy.

Although the Act allows for disclosure of personal information where it is in the public interest to do so, my office has conducted investigations where the deceased's personal information could not be disclosed to the grieving family members because the public interest in disclosure "clearly outweighing any invasion of privacy that could result from the disclosure" could not be identified.

Such an amendment would allow the institution to take into account competing contextual factors, and make a decision based on these factors, including compassionate reasons.

This exemption already exists in many provincial access to information and privacy laws, notably the laws of Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edouard Island and Newfoundland and Labrador.[14]

Business or professional contact information

The disclosure of the name, title, and business or professional address and telephone number of an employee belonging to an organization should be permitted if the organization names the employee in the course of a business, professional or official activity.

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[14] *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 40; *The Freedom of Information and Protection of Privacy Act* SS 1990-91, c F-22.01, s 30; *The Freedom of Information and Protection of Privacy Act*, CCSM c F175, s 44; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, ss 21 and 46; *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, s 46; *Freedom of Information and Protection of Privacy Act*, RSPEI 1998, c F-15.01, s 37; *Access to Information and Protection of Privacy Act*, SNL 2015, c A-1.2, s 68.

Currently, institutions are under an obligation not to disclose such information unless the individual to whom the information relates consents to the disclosure, the information is publicly available or the disclosure is in accordance with section 8 of the *Privacy Act*.[15] This type of information, usually found in email messages and on business cards, is routinely disclosed in the private sector. Therefore, the Act should be amended to permit the disclosure of business or professional contact information in response to access requests, either in circumstances where there is no unreasonable invasion of privacy[16] or by excluding it from the definition of "personal information."[17]

Cabinet confidences

Recommendation 7
Cabinet confidences should be subject to the Act.

Recommendation 8
The Commissioner should have access to records containing Cabinet confidences that the head of an institution has refused to disclose.

The specific objective of Part I of the Act is to give the public the right of access to information from government institutions. Although the objective of this part of the Act is to extend access, the right of access is not unlimited:

- The Act expressly provides that some types of information and records are excluded from the Act. Excluded information is not subject to the right of access.

- The Act provides specific exemptions to disclosure that limit the right of access where information must be protected, for example to prevent an infringement of other rights or to protect national security.

To achieve the main purpose of the Act, it is essential that there be mechanisms for reviewing government institutions' decisions to deny access requests. The mechanisms must be independent of the executive branch. The Act currently provides for two mechanisms: an investigation by the Information Commissioner and a review by the courts.

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[15] *Privacy Act*, RSC 1985, c P-21, s 8.
[16] *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, s 21.
[17] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 2(3).

These mechanisms make it possible to independently review institutions' application of exemptions to disclosure.

However, this is not the case for records excluded from the Act. Records covered by an exclusion rather than an exemption are generally not subject to the review mechanisms provided for in the Act. This includes confidences of the Queen's Privy Council for Canada (Cabinet confidences).

The Act provides for five exclusions, the exclusion under section 69 being the one most frequently invoked by institutions. In the 2018–2019 fiscal year, the number of times institutions invoked the various classes of records under section 69 was 4,660, in comparison with 571 times for section 68, 47 times for section 68.1 and 2 times for section 68.2.[18]

Fiscal year	Number of times section 69 was invoked by institutions
2014–2015	3,122
2015–2016	3,279
2016–2017	4,023
2017–2018	4,279
2018–2019	4,660

* This represents an increase of 1,538 times (or 49.2%) over the last five fiscal years.

As Commissioner Legault noted in a special report to Parliament in 2015[19], the exclusion of Cabinet confidences is problematic, and I agree.

As the Supreme Court of Canada has stated, "[c]abinet confidentiality is essential to good government."[20] However, as Yan Campagnolo writes in his book Le secret ministériel: théorie et pratique, [translation] "the absence of adequate oversight and control mechanisms, coupled with the overly broad scope of the legislative regime, gives the executive branch unlimited discretion that can easily be abused."[21] There needs to be a way to verify whether records that are withheld from disclosure are in fact Cabinet confidences. This is not possible under the current regime chosen by the legislator. In fact, the regime does the following:

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[18] *TBS Statistical Report for the 2018–2019 Fiscal Year*, *supra* note 10.
[19] *Striking the Right Balance for Transparency*, *supra* note 7 at 62.
[20] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para 15.
[21] Yan Campagnolo, *Le secret ministériel: théorie et pratique* (Québec City: Presses de l'Université Laval, 2020) at 11.

- shields Cabinet confidences from the Commissioner's independent review, depriving requesters of a level of review; and
- leads requesters to limit the records they wish to obtain—indeed, requesters frequently stipulate, either in their access request or after being asked to do so by the institution, that they are not seeking information that may be considered a Cabinet confidence.

I should also point out that, each year, my office has seen a decrease in section 69 complaints. This decrease seems to be directly related to the limits on my investigative powers. Although 57 of the 157 complaints received since April 1, 2015, were determined to be well-founded because of insufficient representations made by the institutions, 63 of the 157 complaints were withdrawn by the complainants after the limits of my investigative powers were explained to them.

The principle of confidentiality of Cabinet deliberations presumably prompted the legislator to seek to limit access to Cabinet confidences. Making this information subject to the Act would enable me to verify that the limits intended by the legislator have in fact been observed by the institutions.

An independent review of the records for which an institution claims an exemption for Cabinet confidences would verify that the records fall within one of the classes of records listed in subsection 69(1) of the Act.

Striking the Right Balance for Transparency describes the protection of Cabinet confidences in the Canadian provinces, Australia, the United Kingdom and New Zealand:

> The exemptions for Cabinet confidences in B.C., Alberta, Manitoba, Ontario, New Brunswick, Nova Scotia and P.E.I. focus on the substance of deliberations and then list the type of information this would cover, such as advice, recommendations, policy considerations or draft legislation. Only Newfoundland and Labrador's access law contains an exclusion for ministerial briefing papers. Other Cabinet records in Newfoundland and Labrador are subject to an exemption; however, the Commissioner's oversight is limited when a record is certified as an "official Cabinet record." In the U.K., protections focus on whether disclosure would likely prejudice the maintenance of the convention of the collective responsibility of ministers of the Crown, or would likely

inhibit the free and frank provision of advice, exchange of views for the purposes of deliberation, or would otherwise prejudice the effective conduct of public affairs.[22]

Making the Act applicable to Cabinet confidences would put Canada in a situation similar to that of all the Canadian provinces, and to that of the countries mentioned above.

If Cabinet confidences are made subject to the Act, it would give me access to documents containing Cabinet confidences that the head of a government institution has refused to disclose. Otherwise, it is impossible for me to determine objectively and independently if the records indeed contain Cabinet confidences.

Advice or recommendations

Recommendation 9
Subsection 21(2) of the Act should be amended to add a list of categories of information not covered by the exemption.

Recommendation 10
The 20-year-period provided for in subsection 21(1) of the Act should be reduced to 10 years.

Section 21 of the Act is a discretionary exemption enabling institutions to refuse to disclose any record that contains:

- advice or recommendations developed by or for a government institution or a minister of the Crown;
- 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;
- 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
- 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.

[22] *Striking the Right Balance for Transparency, supra* note 7 at 63 (see footnote 66). Note: Newfoundland and Labrador's statute has been amended since this Report was issued.

However, subsection 21(2) expressly prohibits institutions from invoking paragraph 21(1)(b) to refuse to disclose the following:

- 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
- 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.

Section 21 is one of the exemptions invoked most often by institutions. According to data from the Treasury Board Secretariat, this exemption was invoked 11,609 times in 2018–2019 and in almost one third of the refusal complaints received by the OIC.

It is clear that the public interest requires that the development of government policy and decision-making processes benefit from a degree of protection to enable public servants to give ministers and institutions free, full and frank advice. "The challenge is to protect what needs to be protected in the public interest, and no more."[23] A large portion of the information contained in the records covered by section 21 can be made public without jeopardizing the policy-development or decision-making processes of ministers and institutions. However, OIC investigations show that institutions rely on section 21 without due consideration of the purpose of the exemption and whether the public interest is served by refusing access.

Ontario's *Freedom of Information and Protection of Privacy Act*[24] contains a list of mandatory exceptions to the exemption applicable to the advice and recommendations of a public servant. If the information falls within one of these categories, access cannot be refused. British Columbia has a similar provision.

A more explicit approach involving a list of categories would facilitate the enforcement of the Act. The Department of Justice shared this view in 2006 when it stated that listing categories "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."[25]

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[23] *Making it Work for Canadians*, *supra* note 3 at 47.
[24] Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31, s 13.
[25] *Strengthening the Access to Information Act*, *supra* note 5 at 18.

Like the Access to Information Review Task Force[26] and Commissioner Legault,[27] I recommend that a list of information not protected by the exemption be added to subsection 21(2). This list should specifically include the following information:

- factual material that does not, on its own, reflect the nature or content of the advice;
- opinion surveys;
- statistical surveys;
- economic forecasts;
- appraisals (e.g., an appraisal of real property held by a government institution);
- directives or guidelines for employees of a public institution; and
- information that the head of a government institution has cited publicly as the basis for making a decision or formulating a policy.

The 20-year period during which the exemption applies to records is much too long. It represents an additional obstacle to the timely disclosure of records relating to government activities to allow for a public debate about the conduct of government institutions.

OIC investigations show that institutions have little incentive to exercise their discretion to decide to disclose records less than 20 years old, even though the public interest weighs in favour of disclosure. While the OIC's intervention in the context of its investigations may lead institutions to disclose such records, requiring requesters to file a complaint is not the fastest nor most efficient way to provide access to records that are no longer likely to cause harm.

Accordingly, this period should be reduced to 10 years. As stated in the report of the Access to Information Review Task Force: "In our view, reducing the protective period from 20 to 10 years is unlikely to compromise the frankness or candour of advice being provided to the government, the convention of ministerial responsibility, or the authority of Ministers."[28]

Statutory prohibitions

Recommendation 11
The Information Commissioner should be consulted during the process of adding new statutory prohibitions to Schedule II of the Act.

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[26] *Making it Work for Canadians, supra* note 3 at 48.
[27] *Striking the Right Balance for Transparency, supra* note 7 at 56, recommendation 4.22.
[28] *Making it Work for Canadians, supra* note 3 at 49.

Subsection 24(1) requires institutions to refuse to disclose information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II of the Act.

When the Act was adopted in 1983, this schedule contained 40 prohibitions from 33 statutes. In recent years, the number of statutory prohibitions has continued to increase.

Date of amendment	Prohibitions	Statutes
Schedule as it existed from 2019-06-21 to 2019-08-27	91	63
Schedule as it existed from 2019-06-18 to 2019-06-20	89	62
Schedule as it existed from 2012-07-06 to 2012-09-29	81	60
Schedule as it existed from 2002-12-31 to 2003-05-12	70	52

*The Schedule currently contains 102 prohibitions from 65 statutes.

Many statutory prohibitions have been added without ever having been debated or thoroughly reviewed, especially with respect to the following points:

- factors and grounds justifying their addition to Schedule II;
- effects on access; and
- the need to include them in cases where the Act already grants sufficient protection against disclosure.

Given the significant consequences of these restrictions on access to information, I should be consulted prior to the addition of any new statutory prohibitions. Considering the expertise of the OIC, the consultation would allow us to ensure that any considerations relevant to the right of access are adequately presented to and taken into consideration by Parliament before any other statutory prohibitions are added.

Public interest override

Recommendation 12
The Act should include a provision requiring government institutions to disclose information about a risk of significant harm to public health, public safety or the protection of the environment.

The Act does not include a general public interest override provision. In the case of discretionary exemptions, heads of government institutions are to take into account all relevant factors, including the public interest, when exercising their discretion to either disclose or refuse disclosure. In the case of the Act's mandatory exemptions, only two [s.19(2) and s.20(6)] allow government institutions, for public interest reasons, to disclose third party or personal information that they would otherwise be prohibited from disclosing

The Act, as it is currently written, does not adequately deal with the public's right to information in cases where there is a potential of significant risk of harm to its health or safety. A public interest override recognizes the importance of public access to critical, urgent information held by the government, and the latter's obligation to provide this information without delay.

Six provincial access to information and privacy statutes contain provisions requiring institutions, whether or not an access request is made, to disclose without delay information about a risk of significant harm to the health or safety of the public or to the environment.[29]

Independent review mechanism for Part II of the *Access to Information Act*

Recommendation 13
The Act should contain an independent review mechanism to ensure that institutions comply with the requirements with respect to the publication of information set out in Part II of the Act.

Since 2019, the Act includes a new part (namely, Part II), which requires the proactive publication of specific information of public interest, without requiring an access request be made. These new requirements apply to ministers, to government institutions, and since June 2020, to the Senate, to the House of Commons and to parliamentary entities as well as to institutions that support superior courts.

[29] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 25; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 32; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 11; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s 31; *Freedom of Information and Protection of Privacy Act*, RSPEI 1998, c F-15.01, s 30; *Access to Information and Protection of Privacy Act*, SNL 2015, c A-1.2, s 9.

When Part II was adopted, the government stated that its aim was to improve the way government information was provided to Canadians, to increase the openness of government and its accountability for the use of public funds. However, I have no jurisdiction over this part of the Act, and there is no oversight mechanism on proactive publication requirements currently provided for in the Act.

The Act should therefore contain an independent review mechanism. This would ensure that individuals as well as institutions covered by Part II are indeed complying with the related information publication requirements.

Further recommendations

I would like to take this opportunity to make the following five additional recommendations. While their impact may not be as significant on the access to information regime as the aforementioned recommendations, they will contribute to improving it.

Recommendation 14
The Information Commissioner's authority to publish should be extended to cover decisions rendered with respect to applications to decline an access request set out in section 6.1 of the Act.

Recommendation 15
The timeline for publication set out at subsection 37(3.2) of the Act should be repealed.

Since June 2019, I have been able to publish final reports following my investigations, including any orders that have been issued and/or recommendations made. Publication is important, as it enables both institutions and complainants to know the OIC's position with respect to the application of the Act and institutions' obligations with respect to access. However, this authority to publish is not provided for decisions on applications pursuant to section 6.1 of the Act.

The fact that the Act does not explicitly provide for the publication of my decisions following applications under section 6.1 deprives both institutions and complainants with the aforementioned benefits related to publication. This authority to publish should therefore be extended to my decisions so that these may serve as precedents for institutions and complainants.

Furthermore, under subsection 37(3.2) of the Act, final reports cannot be published prior to the expiration of the timelines for applications for judicial review before the Federal Court. Complainants, and in some cases institutions, must apply for a review within 35 working days following the date of the report. If no such application for review is brought within that time period, third parties and the Privacy Commissioner may, in specific circumstances, apply for a review within the following 10 working days.

In my view, this waiting period for the publication of final reports is unnecessary. Final reports can be published whether or not an application for judicial review has been filed. The purpose of such a waiting period is unclear; it is not apparent what the prejudice would be if final reports would be published prior to the expiration of the timeline for applying for a review. The timeline for publication set out at subsection 37(3.2) of the Act should be repealed.

Recommendation 16
Subsection 63(2) of the Act should be amended to enable the Information Commissioner to disclose information relating to the commission of an offence against a law of Canada or a province by any person.

Recommendation 17
Subsection 63(2) of the Act should be amended to enable the Information Commissioner to disclose to the appropriate authority information relating to the commission of an offence against a law of Canada or a province by any person.

Subsection 63(2) imposes two limitations to my discretionary authority to disclose information relating to the commission of an offence against a law of Canada or a province by any person.

- The first limitation provides that this information may be disclosed **solely** to the Attorney General of Canada, whereas, pursuant to subsection 47(2) of the Act, the Federal Court may disclose that information to the appropriate authority.

There is no apparent rationale for this limitation. As such, subsection 63(2) of the Act should be amended to enable me to disclose to the appropriate authority information relating to the commission of an offence against a law of Canada or a province by any person.

- The second limitation prevents me from disclosing information relating to the commission of an offence by an individual who is not a director, an officer or an employee of a government institution.

The fact that I am not authorized to disclose information except where it involves a director, an officer or an employee of a government institution shelters certain individuals from the disclosure of information, which relates to the commission of an offence. This is the case for, among others, political staff, as well as individuals with whom institutions have entered into a contract, such as consultants and advisors who are not directors, officers, employees. Commissioner Legault's Special Report in 2011 provides an apt illustration of the effects of such a limitation. [30]

If I have information that, in my opinion, might be evidence relating to the commission of an offence, I should be able to disclose that information to the appropriate authority regardless of any relationship the person susceptible of having committed the offence may have with a government institution. Accordingly, subsection 63(2) of the Act should be amended to enable me to disclose evidence related to the commission of an offence against a law of Canada or a province by any person.

Recommendation 18
The notice to third parties set out in section 36.3 of the Act should be repealed.

The amendments made to the Act in June 2019 provide third parties with two separate opportunities to make representations to me during the investigation.

- Where I intend to order or recommend the disclosure of what might contain information described in section 20, third parties must be provided with an opportunity to make representations if the third party can be reasonably located [paragraph 35(2)(c)];

- Where I intend to order the disclosure of what might contain information described in section 20, I must make every reasonable effort to give the third party written notice of my intention. Third parties are entitled to make **new** representations within the timelines provided under the Act [section 36.3].

[30] Information Commissioner of Canada, *Interference with Access to Information: Part 1*, Commissioner Suzanne Legault, (2011).

The second opportunity is not essential to ensuring third parties are provided with the procedural fairness to which they are entitled. Indeed, the Act provides for a detailed process which guarantees third parties procedural fairness and allows them to object to the disclosure of information:

1. I am required to provide third parties with an opportunity to make representations pursuant to paragraph 35(2)(c) of the Act;
2. I am required to provide third parties with my final report provided they were given the opportunity and made representations pursuant to paragraph 35(2)(c);
3. The receipt of my final report opens the way to a review by the Federal Court, if the complainant and the institution have not availed themselves of their right to apply to the Court for a review [subsection 41(3)];
4. Where the complainant or institution have availed themselves of their right to apply to the Court for a review, third parties are entitled to appear as parties to the proceeding and to raise for determination by the Court any matter in respect of which they may make an application under section 41. [subsections 41.2(1) and (2)].

The opportunity provided to third parties at section 36.3 is an additional step in the OIC's investigation process, which, by its very nature, slows that process down. Given that it is not necessary in order to ensure procedural fairness is provided, the notice to third parties set out in section 36.3 of the Act should be repealed.

Conclusion

I hope that the contents of this document will contribute to determining the issues and help guide discussions on reviewing access to information. It is with great interest that my team and I will be following the evolution of this exercise, which I hope will be conducted rapidly and efficiently. I look forward to continue discussing the matter and sharing the OIC's expertise on any topics that may arise.

Appendix

List of recommendations

Recommendation 1
The Act should set out a maximum length of time for consultations needed to respond to access requests.

Recommendation 2
Agencies to whom the government has outsourced the delivery of programs, that provide government services or that carry out activities of a governmental nature should be subject to the Act.

Recommendation 3
The Offices of the Prime Minister and Ministers should be subject to Part I of the Act.

Recommendation 4
The Act should allow heads of government institutions to provide access to personal information where disclosure does not constitute an unwarranted invasion of privacy.

Recommendation 5
The Act should allow heads of government institutions to provide a deceased's person's spouse or close relatives access to their personal information on compassionate grounds.

Recommendation 6
The Act should permit the disclosure of a person's business or professional contact information.

Recommendation 7
Cabinet confidences should be subject to the Act.

Recommendation 8
The Commissioner should have access to records containing Cabinet confidences that the head of an institution has withheld from disclosure.

Recommendation 9
Subsection 21(2) of the Act should be amended to add a list of categories of information not covered by the exemption.

Recommendation 10
The 20-year-period provided for in subsection 21(1) of the Act should be reduced to 10 years.

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