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The Access to Information Act *and Proposals for Reform*

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The Access to Information Act *and Proposals for Reform* (Background Paper)

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THE *ACCESS TO INFORMATION ACT* AND PROPOSALS FOR REFORM

1 INTRODUCTION

It is widely agreed that, several decades after its passage, the *Access to Information Act* should be updated. The legislation is recognized as a critical element of the transparency and openness in government that is necessary to the proper functioning of Canada's parliamentary democracy. In introducing his most recent proposal for legislative reform of the Act in June 2009, former Information Commissioner of Canada Robert Marleau declared that:

> 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 urgently 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.[1]

The Act has been reviewed many times since its inception, giving rise to a significant accumulation of reform proposals. This paper identifies the key points emerging from the major studies of the Act that have been conducted over the last two decades, and analyzes in some detail some recent proposals concerning the legislation.

2 THE *ACCESS TO INFORMATION ACT*

The *Access to Information Act*, in force since 1983, gives Canadians a broad legal right to information that is recorded in any form and controlled by federal government institutions. Individuals may apply for access to certain information, and, unless the requested information falls within specific and limited exceptions, the Act requires its release within specified time limits. The exemptions are set out in the Act; they generally relate to individual privacy, commercial confidentiality, national security or other conditions under which restricted access is necessary for policy-making. Records containing Cabinet confidences are excluded from the operation of the Act for 20 years from the date of their making.

If a request for access to information is refused, the applicant may complain to the Office of the Information Commissioner.[2] Applicants may also complain if they believe that they have been asked to pay too much for copied information, or if the information released was not in the language of the applicant's choice, or if the time taken to release or translate the document was unreasonable. The Commissioner's staff investigates complaints. As an ombudsman, the Commissioner relies on persuasion to resolve disputes. Following the investigation and a report from the Commissioner, complainants have a right to apply to the Federal Court of Canada for a review of a record-holding institution's decision to refuse access as provided under the Act. The Commissioner does not have the power to order a department to release information, but he or she can support a complainant in an application to the Federal Court to order disclosure of records.

3 TWO DECADES OF REVIEW OF THE *ACCESS TO INFORMATION ACT*

Beginning with the statutorily mandated review of the *Access to Information Act* begun in 1986, the Act has undergone a number of important examinations. Summaries of those reviews, as well as several other reform proposals, are presented below in the order in which they appeared.

3.1 *OPEN AND SHUT* JUSTICE COMMITTEE REPORT (1987)

In 1986, three years after the Act came into force, the House of Commons Standing Committee on Justice and the Solicitor General [Justice Committee] conducted a comprehensive review of the provisions and operation of the *Access to Information Act* and the *Privacy Act*. In 1987, the Justice Committee tabled a unanimous report to Parliament, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*,[3] which contained over 100 recommendations for amending both Acts. Many of these recommendations, still unfulfilled, have been repeated more recently in the reports of other reviews of the *Access to Information Act*.

Some of the Justice Committee's proposals, which remain relevant 20 years later, included these: the creation of a public education role for the Information Commissioner; the expansion of the Act's application to all government institutions, unless specifically excluded; and improved training for, and legislative recognition of the role of, government access and privacy coordinators. The Justice Committee dealt extensively with exemptions, recommending the addition of a discretionary injury test in most cases.

The Justice Committee proposed that the exclusion of Cabinet records from the operation of the Act be deleted and replaced with an exemption that would not be subject to an injury test.[4] The proposed exemption would cover all Cabinet records that would reveal the substance of ministers' deliberations and would last for a period of 15 years, rather than the current 20 years. Such a change, had it been approved, would have been significant, because it would have altered the current provision under section 69 of the Act that allows Cabinet records to be withheld from the Information Commissioner and the Federal Court of Canada, as well as the public, preventing the Commissioner and the Court from examining withheld records to determine whether or not they are, in fact, Cabinet confidences. Exempting rather than excluding these documents would allow the Commissioner or the Court to investigate the government's determinations that such documents should not be released.

The Justice Committee also recommended that the Act should cover all publicly funded government institutions, as well as those that raise funds through public borrowing, depending on the degree of government control exercised. It proposed the inclusion of all Crown corporations and wholly owned subsidiaries that are listed in the Treasury Board's *Annual Report to Parliament on Crown Corporations and Other Corporate Interests of Canada*; any body whose members are appointed by the federal government; both houses of Parliament (excluding the offices of Members

of Parliament and Senators); the Library of Parliament; and other offices directly accountable to Parliament.[5]

Finally, the Justice Committee's report included recommendations to eliminate application fees and to allow the Commissioner to empower a government institution to disregard frivolous or vexatious requests.

In an earlier report, which was included as Appendix B[6] to the main report, the Justice Committee recommended that the Act be amended by repealing two elements: section 24, which currently provides for a mandatory exemption for information whose disclosure is restricted by a statutory provision listed in Schedule II of the Act; and Schedule II itself. The deleted provisions would be replaced with mandatory exemptions for three statutory provisions requiring specific protection because they deal with income tax records and information provided by individuals, corporations and labour unions for statistical purposes.[7]

The government response to the report, entitled *Access and Privacy: The Steps Ahead*,[8] generally supported the administrative, but not the legislative, changes proposed in the Justice Committee report.

3.2 *A CALL FOR OPENNESS* AD HOC MPS' COMMITTEE REPORT (2001)

In the summer of 2001, a number of Members of Parliament from various parties formed an ad hoc Committee on Access to Information to review the federal access regime. The ad hoc MPs' Committee, chaired by Liberal MP John Bryden, produced a report in November 2001, *A Call for Openness*,[9] containing 11 recommendations for improving the provisions and operation of the Act.[10]

In undertaking this study, the ad hoc MPs' Committee was at least partly motivated by a concern that the Access to Information Review Task Force (discussed below) had not provided for consultation with the public or with parliamentarians. Citing a growing diversification of the mechanisms through which public purposes are pursued, such as privatization, contracting out and the creation of special operating agencies, the ad hoc MPs' Committee advocated a principled approach to determining which government institutions should be subject to the Act. It recommended that the Act should cover any institution that is established by Parliament, publicly funded, publicly controlled, or that performs a public function. The ad hoc MPs' Committee recommended that the Act should be amended to enshrine those principles, and that all institutions that fit within them should be listed in Schedule I of the Act, including Crown corporations, Parliament (except for parliamentarians' offices), and offices reporting to Parliament.[11]

While recognizing the sensitivity of Cabinet records, the ad hoc MPs' Committee recommended that the section 69 exclusion of Cabinet records be replaced by an injury-based discretionary exemption to protect the confidentiality of Cabinet deliberations for 15 years after the creation of the records. This would allow for independent review of decisions about such records by the Information Commissioner and the Federal Court of Canada.

The exemption in section 14 for records relating to the conduct of federal-provincial affairs was determined by the ad hoc MPs' Committee to be overly broad, and the Committee recommended that the exemption be narrowed so that it was available only in relation to federal-provincial consultations and deliberations. The ad hoc MPs' Committee also recommended narrowing the exemption for solicitor-client privilege, proposing that it be made an injury-tested rather than a class exemption,[12] and that it be available only where the person creating the record had done so as counsel to an institution in the context of actual or contemplated litigation.

The ad hoc MPs' Committee recommended the inclusion in the Act of a general "passage of time" provision, providing for the routine release of all documents within an institution's control 30 years after their creation.

An amendment to require a comprehensive parliamentary review of the *Access to Information Act* every five years, as well as ongoing compliance reviews by the departments responsible for the Act, was also called for in the report. A final matter dealt with the then-proposed *Anti-Terrorism Act*, Bill C-36.[13] This legislation, passed in December 2001 but still under consideration at the time of the ad hoc MPs' Committee's report, added section 69.1 to the *Access to Information Act*, to exclude from the operation of the Act any documents that are prohibited from disclosure by certificates issued under the *Canada Evidence Act*. The ad hoc MPs' Committee indicated that it would have preferred that the relevant clause be withdrawn, but recommended that, if it passed, it should be subject to a three-year sunset clause.

3.3 *ACCESS TO INFORMATION: MAKING IT WORK FOR CANADIANS* REPORT OF THE ACCESS TO INFORMATION REVIEW TASK FORCE (2002)

In August 2000, the President of the Treasury Board and the Minister of Justice established the Access to Information Review Task Force to review all components of the Access to Information Framework, including the Act, regulations, policies and procedures. The Task Force, consisting of government officials and chaired by Andrée Delagrave,[14] created advisory committees, published a consultation paper, commissioned and published research papers, and held consultations. In June 2002, it released a lengthy report, *Access to Information: Making it Work for Canadians*,[15] containing 139 recommendations for change.

The report indicated that the members of the Task Force were concerned with how new information technology might affect the way government information is created, communicated and stored. While it judged the Act to be basically sound, the Task Force recognized a need to modernize some aspects of it, and examined in detail a number of procedural and administrative aspects of the government's implementation of the Act.

Recommendations for modernizing the Act included these: expanding its scope by extending coverage to a wider range of federal institutions, including most Officers of Parliament, as well as to Parliament, with certain protections; modernizing the exemption and exclusion provisions, by, for example, including Cabinet confidences in the operation of the Act; improving the training and resources available to access-to-information staff; improving information management; and facilitating, across

government, a culture supportive of access. The report also recommended that consideration be given to replacing the current ombudsman model of the Office of the Information Commissioner with one having full order-making powers.

The Task Force took a more cautious approach to expanding the Act's institutional coverage than had previous committees reviewing the *Access to Information Act*. It recommended that the Act should not extend to every private-sector entity that might be viewed as having an impact on the public interest. It recommended that, except where inclusion would be "incompatible with the organization's structure or mandate,"[16] the Act be amended to set out criteria for determining which entities should be covered, including those for which the government appoints a majority of board members, provides all funding or owns a controlling interest; or those functioning in an area of federal jurisdiction with respect to health and safety, the environment or economic security. The Task Force proposed that the Act apply to Parliament, but exclude information protected by parliamentary privilege and the personal, political and constituency records of parliamentarians.

The recommendations concerning the treatment of Cabinet confidences included a proposal to narrow the definition of what would be inaccessible; it would focus on information that would reveal the substance of matters before Cabinet and deliberations between or among ministers. At the same time, while the Task Force proposed that Cabinet confidences no longer be excluded from the Act, it recommended that Cabinet documents be protected by a class exemption, making asserting Cabinet confidence mandatory and so forbidding the disclosure of such records. Under the Act, there is currently room for discretionary disclosure of these records: Cabinet confidences are excluded from the operation of the Act, but if ministers and the Clerk of the Privy Council choose not to assert Cabinet confidence, then such documents may be released. The Commissioner argued in his response to the task force (discussed below)[17] that such discretion would be lost if this recommendation were implemented.

Endorsing some of the 1986 proposals of the Justice Committee, the Task Force recommended that the period for which Cabinet confidences are protected should be reduced from 20 to 15 years, and that decisions to refuse to disclose records on the basis of Cabinet confidence should be reviewable by the Federal Court, rather than the Information Commissioner.

Rather than recommending the repeal of section 24, which exempts from disclosure records restricted by a statutory provision listed in Schedule II of the Act, as the Justice Committee had, the Task Force recommended its retention, but proposed that the list of statutes in Schedule II be substantially reduced by assessing them against new criteria that should be developed and included in the Act.

3.4 THE INFORMATION COMMISSIONER'S RESPONSE TO THE REPORT OF THE ACCESS TO INFORMATION REVIEW TASK FORCE (2002)

In October 2002, the Information Commissioner of Canada, the Honourable John Reid, tabled a special report[18] in Parliament responding to *Access to Information: Making it Work for Canadians*, the report of the Access to Information

Review Task Force, and outlining his proposals for legislative change in Appendix A, the "Blueprint for Reform" reprinted from the 2000–2001 annual report for the Office of the Information Commissioner of Canada. The Commissioner was critical of both the process and the results of the Task Force's review. He said that the Task Force, being composed of government officials who consulted heavily within government, was too strongly influenced by "insiders"; the Commissioner felt that, as a result, the recommendations in the report would weaken the access-to-information regime.

Some of the Task Force recommendations that were of most concern to the Commissioner were those related to the Act's exemption and exclusion provisions. While four of the recommendations would increase openness, most importantly the inclusion of Cabinet confidences under the Act, the Commissioner argued that 15 of the proposals would increase secrecy. He was especially concerned about the Task Force's proposal to exclude from the right of access notes made by public servants in the course of their duties, if the notes were "not shared with others or placed on an office file."[19]

Commissioner Reid advocated the use of exemptions rather than exclusions where secrecy is justifiable, adding that the exemptions should be made discretionary and subject to an injury test as well as a public interest override. He recommended that all public institutions, as well as all private institutions exercising public functions, be brought within the scope of the Act. He objected to the Task Force's recommendation to deny his office the right to investigate complaints about cases concerning Cabinet confidences, and disagreed with several other proposals that he said would increase Cabinet secrecy.

Proposed increases to fees and the creation of additional hurdles to be overcome by people requesting access were also criticized by Commissioner Reid as pro-secrecy recommendations. In his response, the Commissioner further recommended the creation of a legislative duty requiring public servants to document their business activities and ensure that those records are properly included in an institutional record management system. The Commissioner supported the Task Force proposals for promoting a culture of openness in the public service, and he recommended that public consultations precede the drafting of legislation based on the report.

The "Blueprint for Reform" set out recommendations for access to information reform: that the Cabinet confidence exclusion be transformed into a more limited exemption, subject to independent review; that the scope of the Act be expanded by setting legislative criteria for institutions that should be covered; that section 24 be abolished; and that incentives and penalties related to deadlines under the Act be established. The Blueprint recognized that its proposed criteria for the inclusion of more institutions under the Act[20] would bring under its purview both houses of Parliament, and recommended that the Act include a specific exclusion from its coverage for the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada, and the offices of members of the House of Commons and the Senate.

Commissioner Reid also recommended that the Act be subject to a general public interest override, such that the Act would require government to disclose, with or without a request, "any information in which the public interest in disclosure outweighs any of the interests protected by the exemptions."[21]

3.5 PRIVATE MEMBERS' BILLS: C-462 (2003) AND C-201 (2004)[22]

In the fall of 2003, the chair of the ad hoc MPs' Committee, John Bryden, attempted to initiate a comprehensive overhaul of the Act through a private Member's bill, Bill C-462,[23] which died on the *Order Paper* with the dissolution of the 37th Parliament in May 2004. A similar bill, C-201, was introduced by NDP MP Pat Martin on 7 October 2004.[24] Because the bills' provisions are virtually identical, they will be referred to as one bill in this paper.

The bill would have changed the name of the *Access to Information Act* to the "Open Government Act." It would have expanded the scope of the Act by adding new institutions to Schedule I,[25] which lists the institutions to which the Act applies. The bill would have broadened the purpose section of the Act, adding a reference to the federal government's obligation to release information to assist Canadians in assessing government effectiveness and compliance with the *Canadian Charter of Rights and Freedoms*.

The bill also proposed a number of changes to the exemptions provided under the Act, and would have deleted section 24 of the Act. It would have extended the Commissioner's reporting requirements to require that his or her annual report list the names of every government institution that failed to meet the requirements of the Act. A new section would have created the offence of wilfully obstructing a person's right of access under the Act to a record under the control of a government institution.

Another new section would have brought Cabinet confidences under the Act: it included provision for a mandatory exemption covering information that was less than 15 years old and the revelation of the substance of deliberations between ministers in making government decisions or setting policy.

3.6 THE JUSTICE MINISTER'S *COMPREHENSIVE FRAMEWORK FOR ACCESS TO INFORMATION REFORM* (2005)

In April 2005, the Justice Minister introduced a discussion paper entitled *A Comprehensive Framework for Access to Information Reform*,[26] asking the House of Commons Standing Committee on Access to Information, Privacy and Ethics for input on a range of policy questions before the introduction of legislation. Many areas were left open for the consideration of the Committee, but in some areas government positions were indicated.

When he presented the Framework to the Committee in April 2005, the Minister indicated that while he agreed that reform of the *Access to Information Act* was required, he believed it important that a parliamentary committee first study the major issues before draft legislation was developed.[27] Both in that meeting and in the Framework, the Minister stressed the importance of freedom of information

legislation, saying it provides the "cornerstone of a culture of democratic governance, involving accessibility, transparency, and accountability in government."[28] The changing technological context in which government operates, as well as the increasing number of government functions outsourced to consultants, contractors or alternative service delivery organizations, was mentioned in the Framework as supporting the need for modernization of the Act.

The Framework contained proposals to change some aspects of the scope of the Act, and asked the Committee to consult the public and make recommendations in relation to others. It identified 10 parent Crown corporations that could be included without legislative reform,[29] and indicated that the process for extending the Act to those entities was already under way.[30] For seven other Crown corporations, the paper expressed the view that exemptions in the current Act were not sufficient to protect their commercial or other interests.[31] The paper suggested that six of those seven could be included with the addition of the proper protections, but that the Canadian Broadcasting Corporation might more appropriately be excluded to protect its journalistic integrity. It was recommended that the Canada Pension Plan Investment Board, the 18th Crown corporation under consideration for inclusion in the *Access to Information Act*, not be included, and consultation with the provinces was proposed because of the federal/provincial nature of the organization.

Regarding the extension of the Act's coverage to institutions outside the Government of Canada itself, the Minister agreed with earlier proposals that criteria be developed to determine which bodies should be covered, and emphasized that the criteria should be related to stable characteristics, such as function or controlling interest by the government, and not to fluctuating characteristics, such as funding. The paper noted the earlier recommendations that Officers and agents of Parliament, as well as Parliament itself, be covered, and suggested that the Committee consult those that would be affected in order to determine what special protections might be needed.

Concerning who should have the right to apply for records under the Act, the Framework asked the Committee to consider whether the right to apply should be extended to any person. Currently, the Act provides that right to Canadian citizens and permanent residents, and to anyone else present in Canada; that right is not available to non-Canadians who are outside Canada. The Framework suggested that there might be costs associated with universal access that should be considered before such a change was implemented.

In the Framework, the Minister proposed the continued exclusion of Cabinet confidences, more narrowly defined,[32] from the application of the *Access to Information Act*, but suggested empowering the Information Commissioner to ask the Federal Court to review the government's determination that information sought under an access request fell within the definition of a Cabinet confidence and therefore was not accessible. The Minister also proposed to maintain the 20-year period of protection for such records, rather than reduce the period to 15 years.

No proposal was made in the Framework to change the treatment of records in ministers' offices. Such records, which the government continues to treat as excluded from the operation of the Act, include materials such as planners and

calendars that are not generated by officials within the department and that pertain more to the activities of the Minister and the operations of his or her office. This interpretation – that such documents should be excluded – has been challenged in court by the Information Commissioner.[33]

The Framework referred to recommendations by the Commissioner and the Task Force for changes to the exemptions in the Act, including those dealing with records obtained from other governments, information that could threaten health and safety, government economic interests, third-party information, draft audits, and advice and deliberations; and it asked the Committee to express its views on those earlier proposals. Pointing out that the ambit of the exemption for solicitor-client privilege has been contentious, the Framework recognized a need for clarification of sections 23 and 25 of the Act, the combined effect of which is to protect such information but to require the release of those parts of records that can be severed from the privileged parts.

A similar rationale to that which underlies traditional solicitor-client privilege, fostering free information sharing and negotiation by ensuring a context in which the parties are confident that the information offered will remain confidential, was described as also supporting the emerging concept of mediation privilege. The Framework proposed that this new privilege should be explicitly protected under the *Access to Information Act*. The Minister also sought the Committee's suggestions regarding other forms of privilege that might justify protection under the Act.

The Framework indicated the government's willingness to consider the proposals, in Bills C-462 and C-201, to add exemptions to the Act to protect information that, if disclosed, could damage or interfere with the preservation, protection or conservation of cultural and natural heritage sites or increase the risk of extinction of endangered species. It also indicated that a provision excluding notes taken by members of administrative tribunals and boards during quasi-judicial proceedings was being considered by the government. The need for this new statutory exemption has been questioned in a number of the reports discussed above, on the basis that these types of information are already adequately protected by the exemptions for personal information and third-party information.

Both the Information Commissioner's "Blueprint for Reform" and the private Members' bills recommended the elimination of section 24 and Schedule II of the *Access to Information Act*. In the Framework, the Minister supported the Task Force's proposal that the provisions be retained, but recommended that the number of provisions in Schedule II be reduced and that criteria be established to determine the provisions that should be listed in future. The paper suggested that a high standard for inclusion should be set, with specific criteria and the requirement that the government institution seeking to add a provision justify why the information cannot be adequately protected by the exemptions already in place in the Act.

A number of process issues were raised for discussion in the Framework, including: whether the basic application fee should be changed; whether the fee structure should distinguish between commercial and non-commercial requesters; how to deal with extremely large requests, or frivolous, vexatious and abusive requests; whether

new administrative time limits should be imposed; whether institutions should be required to assist applicants in formulating requests; whether the non-investigative processes of the Office of the Information Commissioner should be enshrined in the legislation; and whether the Act should be amended to codify certain processes to ensure procedural fairness in the redress process.

The Framework, like the Task Force report, suggested that studying the possibility of changing the Office of the Commissioner of Information from a body operating as an ombudsman to a quasi-judicial, order-making body might be a good route to follow. Non-legislative reforms to enhance the public service culture of transparency and improve government compliance with the *Access to Information Act* were also suggested in the paper, with the request that the Committee determine in which areas the available resources might best be spent.

3.7 THE "OPEN GOVERNMENT ACT" PROPOSED BY THE INFORMATION COMMISSIONER (2005) AND RELATED PRIVATE MEMBERS' BILLS (2008 AND 2009)

Rather than embarking on a study of the matters raised in the Framework, the Committee asked Information Commissioner John Reid to develop a bill that would amend the Act. This he did, with the help of the Legislative Counsel of the House of Commons. The Information Commissioner's proposal, in the form of a bill amending the *Access to Information Act*, would go substantially further in promoting openness than any of the previous reform proposals.[34] Like Bills C-462 and C-201, the Commissioner's proposed bill would be entitled the "Open Government Act," and it would expand the number of institutions to be covered by the *Access to Information Act*, reduce the scope of secrecy permitted by the Act, expand the powers of oversight by the Commissioner and the courts, and increase incentives for compliance and penalties for non-compliance.

The Commissioner's proposed "Open Government Act" was endorsed by Justice John Gomery in his 2006 Phase 2 report for the Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability*.[35] All of the elements of the proposal reviewed in this paper were supported in the Gomery report, which also specifically urged the government to adopt legislation requiring public servants to document decisions and recommendations, and made it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.[36]

The Commissioner's proposed bill would extend the Act's scope to cover all federal institutions except the courts and the offices of Members of the House of Commons and Senators. A new provision would require the federal Cabinet to include the following in the list of bodies covered under the bill, to be set out in Schedule II[37]: all departments; all bodies or offices funded in whole or in part from parliamentary appropriations or wholly or majority-owned by the federal government; all bodies listed in Schedules I to III of the *Financial Administration Act*; and all bodies performing public functions in areas of federal jurisdiction that are essential to the public interest in relation to health, safety or environmental protection. Officers and

agents of Parliament, namely, the Auditor General, the Chief Electoral Officer, and the Information Commissioner, Privacy Commissioner and Official Languages Commissioner of Canada, would be included and would be in the Schedule II list of all the institutions covered by the Act.

In order to clarify the issue of records held in ministers' offices, which is currently before the Federal Court of Appeal,[38] and to explicitly make such records subject to disclosure under the Act, the proposal would amend the definition of "government institution" in section 3 to include the offices of heads of federal government departments or ministries of state.

The proposed bill would expand the purpose section of the Act to include the concept of making government institutions accountable to the public, a proposal that is similar to provisions in Bills C-462 and C-201. The bill would also make the right of access universal, by permitting any person to be given access to requested records.

The bill would significantly change the exclusions and exemptions currently in place. Cabinet confidences would no longer be excluded, and would become subject to review by the Information Commissioner and the courts if the government claimed an exemption. Under clause 69 of the bill, a mandatory exemption would protect Cabinet confidences for 15 years, but background materials and analyses would be protected for only four years after the related decisions had been made. All exemptions would be subject to a public interest override. All of the existing mandatory class exemptions, including the exemption dealing with solicitor-client privilege, would be converted into discretionary exemptions subject to an injury test. For example, the mandatory exemption for records related to information obtained from other governments would become a discretionary one, allowing the head of an institution to refuse to disclose a record where "disclosure of the information would be injurious to relations with the government, institution or organization" (clause 13(1)(*b*)).

A proposed new exemption would permit the Canadian Broadcasting Corporation to refuse to disclose "any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the integrity or independence of the institution's newsgathering or programming activities" (clause 16(4)).

The current section 17 of the *Access to Information Act* creates a discretionary exemption dealing with safety-related concerns. This would be expanded to cover information that could threaten the mental or physical health of individuals, and "that could reasonably be expected to increase the risk of extinction of an endangered species or increase the risk of damage to a sensitive ecological or historic site."

The *Access to Information Act*'s section 21 exemption for advice given to the government would be restricted to cover information that is no more than five years old, and it would be made subject to an injury test. A new subsection (2) would codify case law guidance, distinguishing materials such as surveys, polls, audits, final reports and other factual material from this exemption.

As the Commissioner had consistently recommended, his proposed bill would repeal section 24 and Schedule II.

The proposals would impose obligations on government to monitor the operations of the access to information program and to collect statistics and report annually on the performance of the system. Access to information coordinators would be referred to as "Open Government Coordinators" under the new provisions. These coordinators, along with heads and deputy heads of institutions, would be under a positive duty to ensure, to the extent reasonably possible, that the rights and obligations set out in the Act were respected and discharged by the institution (clause 73.1).

The bill would allow the head of a government institution to extend unreasonable time limits for large requests in certain circumstances. It would require the institution to waive fees in a situation where the head of the institution was deemed to have refused access,[39] and permit that fees be waived upon consideration of factors such as whether a record had been previously released, whether a record was related to public health or safety or consumer or environmental protection, and whether disclosure would be in the public interest. Heads of institutions could also complain to the Information Commissioner when requests were contrary to the purposes of the Act (clause 30(1)(*d*.*2*), and on the recommendation of the Commissioner they could disregard such requests.

A unique element of this proposal package was the creation of a legal duty to create appropriate records, along with a corresponding offence for the failure to fulfill that duty (clauses 2.1 and 67(1)(*c*.*1*)). As the Commissioner explained in October 2005, when he met with the House of Commons Standing Committee on Access to Information, Privacy and Ethics to introduce his proposals, this provision is necessary to counteract a growing problem with record-keeping in government. A legal requirement that officials keep appropriate records is necessary in light of "the reality that the right of access is being rendered meaningless by a growing oral culture in government."[40] The proposed bill would also add a duty of government institutions to assist requesters in making their requests (clause 2(3)), a provision that was not present in Bills C-462 and C-201.

Clause 37.1 would add a provision creating a defence for individuals who might be charged with an offence or other wrongdoing by "disclosing, in good faith to the Information Commissioner, information or records relating to a complaint under this Act."

A proposed amendment to section 54 would require a two-thirds majority of the House of Commons and the Senate in support of an Information Commissioner's appointment.[41] Clause 60.1 would add public education, research and advocacy roles to the Commissioner's mandate. Clause 75 would require a parliamentary review of the administration of the legislation every five years.

The Commissioner did not recommend that the approach of his Office be changed from that of an ombudsman to that of a quasi-judicial, order-making body. He argued that the ombudsman model works effectively, saying that fewer than 1% of complaints end up in the courts, and that based on experience in other jurisdictions, the order-making model would not reduce litigation or improve outcomes.

In the spring of 2008 two MPs introduced very similar bills aimed at amending the *Access to Information Act* to implement the reforms proposed by Information Commissioner John Reid in 2005. NDP MP Pat Martin introduced Bill C-554,[42] An Act to amend the Access to Information Act (open government), on 29 May 2008. A few days later, on 2 June, Bloc Québécois MP Carole Lavallée introduced Bill C-556,[43] An Act to amend the Access to Information Act (improved access). Both bills died on the *Order Paper* with the dissolution of the 39th Parliament in September 2008. Mr. Martin re-introduced his bill in the 40th Parliament on 25 February 2009,[44] and again in the 41st Parliament on 29 September 2011.[45]

3.8 MOTION IN THE HOUSE OF COMMONS AND THE SEVENTH REPORT OF THE HOUSE OF COMMONS STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS (2005)

By motion passed in the House of Commons on 15 November 2005, Members agreed that the *Access to Information Act* should be amended to effect the following:

> (*a*) expand coverage of the Act to all Crown corporations, all Officers of Parliament, all foundations and to all organizations that spend taxpayers' dollars or perform public functions;
>
> (*b*) establish a Cabinet-confidence exclusion, subject to review by the Information Commissioner;
>
> (*c*) establish a duty on public officials to create the records necessary to document their actions and decisions;
>
> (*d*) provide a general public interest override for all exemptions …; and
>
> (*e*) make all exemptions discretionary and subject to an injury test.[46]

Although it did not recommend specific reforms to the Act, the Seventh Report of the House of Commons Standing Committee on Access to Information, Privacy and Ethics[47] was intended to communicate to the government, and in particular to the Minister of Justice, the Committee's position on the direction the legislative work on reform should take. Preferring not to hold hearings on the Minister's April 2005 Framework, the Committee expressed its preference for legislative action in this report.

Just one week before the dissolution of the 38th Parliament, the Committee reported to the House of Commons, recommending that the Justice Minister consider the advisability of introducing legislation in the House of Commons based on the provisions of the "Open Government Act" proposed by the Information Commissioner.

3.9 *FEDERAL ACCOUNTABILITY ACT* (2006)

The *Federal Accountability Act*[48] was introduced by the government in April 2006 and became law in December of that year. It amends the *Access to Information Act* in three areas by expanding coverage of the Act to a number of federal institutions, by adding new exclusions and exemptions under the Act and by creating a duty to assist. Each of these areas will be briefly discussed below.[49]

The *Federal Accountability Act* expands the coverage of the *Access to Information Act* to include a number of Officers of Parliament and Crown corporations, as well as the Canadian Wheat Board and various foundations created under federal statute. The *Federal Accountability Act* also amended the regulatory powers under section 77 of the *Access to Information Act* to allow for additional bodies to be added to the Act in the future. Under this new provision, Cabinet now has the power to make regulations prescribing criteria for adding a body or office to Schedule I of the Act.

The *Federal Accountability Act* also provides for new exclusions and exemptions under the *Access to Information Act* related to the addition of the Officers of Parliament, Crown corporations and foundations to the government institutions covered by the *Access to Information Act*. For example, the new exclusions and exemptions protect particular types of information gathered or generated by Officers of Parliament. Section 16.1 of the *Access to Information Act* requires the heads of some government institutions, including the Auditor General of Canada and the Information, Privacy and Official Languages Commissioners to refuse to disclose information obtained or created in the course of an investigation, examination or audit. Section 16.3 also allows the Chief Electoral Officer to refuse to disclose information related to investigations, examinations or reviews under the *Canada Elections Act* unless the information must be made public under the *Canada Elections Act*.

The *Federal Accountability Act* further provides that the economic interests of certain Crown corporations, including Canada Post, Export Development Canada, the Public Sector Pension Investment Board and VIA Rail, are protected by section 18.1. This section permits the head of the corporation to refuse to disclose a record containing trade secrets or financial, commercial, scientific or technical information that the corporation owns and has consistently treated as confidential.

Another exception created under the *Federal Accountability Act* can be found at section 22.1 of the *Access to Information Act*: the heads of government institutions may refuse to disclose records less than 15 years old that contain draft reports of internal audits of government institutions or related audit working papers, unless the audit is not reported within two years of its commencement.

Finally, the *Federal Accountability Act* creates a duty to assist by adding subsection 4(2.1) to the *Access to Information Act*. This duty requires institutions to assist requesters without regard to their identity and to make “every reasonable effort to assist,” to respond accurately and completely, and to provide access in the format requested.

3.10 *STRENGTHENING THE* ACCESS TO INFORMATION ACT GOVERNMENT DISCUSSION PAPER AND THE INFORMATION COMMISSIONER’S RESPONSE (2006)

In April 2006, when it introduced the *Federal Accountability Act*, the government tabled a discussion paper entitled *Strengthening the* Access to Information Act – *A Discussion of Ideas Intrinsic to the Reform of the* Access to Information Act.[50] This discussion paper offered comments on some of the Information Commissioner’s

2005 proposals (in the "Open Government Act") and some alternate approaches to consider for reform. While the *Federal Accountability Act* introduced some reforms to the *Access to Information Act* (see the section on the *Federal Accountability Act*, above), the government noted that the remaining proposals required further consultation, analysis and development before additional reforms could be drafted and introduced. In particular, the discussion paper noted that no consultations had been undertaken on the recommended reforms, and suggested engaging in consultations with stakeholders representing all aspects of the system: requesters, access officials, outside institutions which provide information to the government, organizations being considered for coverage, and officials from institutions which may be most affected by proposed changes.

Below is a summary of the main points raised in the discussion paper:

1. **Coverage of the Act**: The discussion paper highlighted various concerns regarding what institutions could be included under the ambit of the Act, and whether additional exemptions should be added depending on the nature of the institution. The discussion paper suggested considering the probable cost of expanding coverage under the Act, as well as the implications of expanded coverage on the Act's companion legislation, the *Privacy Act* and the *Library and Archives of Canada Act*.
2. **Application of the Act to the Offices of Ministers, Members of Parliament, the House of Commons, the Senate, and the Library of Parliament**: According to the discussion paper, extending the Act to cover all members of the House of Commons (as opposed to extending the application of the Act to ministers alone) would ensure that the Act did not create two classes of Members, those covered and those not covered by the Act. Personal and political records would be excluded from coverage. If coverage was to be extended to the House of Commons, the Senate and the Library of Parliament, then there would need to be protection (or exclusions) for parliamentary privilege, political parties' records, and personal and political records. Records regarding the financial administration of these institutions would be accessible under the Act.
3. **Cabinet Confidences**: The discussion paper noted that it might be wise to maintain the exclusion for Cabinet confidences, which it described as consistent with the current government's commitment to subject the exclusion of Cabinet confidences to review by the Information Commissioner. An option would be to legislate a certification and review process in the Act that would closely parallel the *Canada Evidence Act*, whereby the certification of Cabinet confidences could only be challenged where the information for which the privilege was claimed does not appear to fall within the statutory definition of Cabinet confidences, or where it could be shown that the Clerk had improperly exercised the jurisdiction conferred.
4. **Exemptions Scheme**: The discussion paper raised numerous questions with regard to proposed amendments to the exemptions scheme found in the Act. As noted in the paper, the Information Commissioner proposed three broad changes to the exemptions scheme: transforming most mandatory exemptions into discretionary ones, adding more injury tests, and adding a broad public interest override test to all exemptions. The discussion paper noted that following the release of the Commissioner's proposals, concerns were raised about the potential impact on relationships between government and its stakeholders, on

government's core operations, and on third party stakeholders themselves. In sum, the concerns raised in the discussion paper centred on whether and to what extent increasing access to information could make politicians, members of the public service, other governments, and various third parties less willing to provide the Canadian government with information in confidence if that information would be more likely to be subsequently exposed, or to engage in full and frank discussion about ideas when such discussion might be subject to disclosure. The discussion paper suggested considering the views of those who could be impacted by the Commissioner's proposals to reform the exemptions scheme in the Act, such as senior managers of government institutions.

5. **Administrative Reform**: The discussion paper was generally supportive of the proposals for administrative reform suggested by the Information Commissioner. For example, the discussion paper recognized that amending the Act to allow for universal access to the Act's regime would bring Canadian legislation in line with other jurisdictions, such as Australia, Ireland, New Zealand, the United Kingdom and the United States. The discussion paper also recognized that the proposal for a public register of access requests could be a useful tool for government and the public, to foster transparency. However, the paper noted that the various proposals raised cost concerns that would need to be considered more fully. Regarding changes to the fee structure, the discussion paper noted such changes would have to be clear so that users would not become confused. It also noted that a variable fee structure with a full cost recovery scheme for foreign requesters could be considered to offset the increased costs of universal access to the Act's regime.

6. **Duty to Document**: The Information Commissioner had proposed adding to the Act a duty to document, or to create adequate records in order to allow a subsequent understanding of the decisions made and the actions taken, along with a related sanction for failure to create a record. The discussion paper noted that any duty would have to be precise enough to ensure that public servants had a clear understanding of what was expected of them, particularly if a sanction were to be applied. Whether a duty to document was enshrined in legislation or reinforced in policy, the discussion paper underscored the need for substantial training for public servants to ensure the proper creation and management of information.

7. **Role of the Information Commissioner**: The discussion paper raised concerns about the Information Commissioner's proposals to broaden the grounds under which the person holding the office of Information Commissioner might disclose information. The main concern was that an unintentional consequence of the Commissioner's proposals could be reluctance by the government to make full and complete representations to the Information Commissioner when justifying its refusal to disclose records requested under the Act; such reluctance might be based on a fear that its representations (which could contain confidential information) would be disclosed by the Commissioner to the complainant or any other third party. With regard to the proposed new section of the Act that would broaden the mandate of the Information Commissioner's office (to allow it to monitor the administration of the Act, comment on proposed legislation or government programs, engage in public awareness and public sector training, and research any matter that might affect the attainment of the purposes of the Act), the discussion paper noted that there would be a need to coordinate roles between the Information Commissioner and the President of the Treasury Board, who has similar responsibilities.

Following the tabling of the government's proposed *Federal Accountability Act* and the discussion paper on reform of the *Access to Information Act*, the Information Commissioner issued a special report to Parliament (in accordance with section 39(1) of the Act), *Response to the Government's Action Plan for Reform of the* Access to Information Act.[51] In the special report, the Information Commissioner critiqued the government's approach to the access to information elements of its accountability package of reforms. According to the Information Commissioner, many of the key reforms which the government had promised to enact were not included in the *Federal Accountability Act*. As well, the changes to the *Access to Information Act* made in the proposed *Federal Accountability Act* would add institutions to the coverage of the Act, but they would do little to increase public access to information held by the newly added entities. Furthermore, although the government stated that it had issued its discussion paper to aid the study and discussion of access reform, the Information Commissioner said that the content of the paper raised serious concerns: In all, the Information Commissioner noted, "What the government now proposes – if accepted – will reduce the amount of information available to the public, weaken the oversight role of the Information Commissioner and increase government's ability to cover-up wrongdoing, shield itself from embarrassment and control the flow of information to Canadians."[52]

3.11 *THE* ACCESS TO INFORMATION ACT*: FIRST STEPS TOWARDS RENEWAL* – THE INFORMATION COMMISSIONER'S REFORM PROPOSALS, THE ACCESS TO INFORMATION COMMITTEE'S REPORT, AND THE GOVERNMENT'S RESPONSE (2009)

In March 2009, in the wake of the publication of his special report on systemic issues affecting the access to information regime, then Information Commissioner Robert Marleau presented the House of Commons Standing Committee on Access to Information, Privacy and Ethics with 12 recommendations aimed at modernizing the *Access to Information Act* in various areas.[53] The Commissioner said that the 12 recommendations were only starting points for a more comprehensive reform of the *Access to Information Act*.

The Commissioner's reform proposal recommended these amendments to the *Access to Information Act*:

1. That Parliament review the *Access to Information Act* every five years.
2. That all persons have a right to request access to records pursuant to the *Access to Information Act*.
3. That the *Access to Information Act* provide the Information Commissioner with order-making power for administrative matters.
4. That the *Access to Information Act* provide the Information Commissioner with discretion on whether to investigate complaints.
5. That the *Access to Information Act* provide a public education and research mandate to the Information Commissioner.
6. That the *Access to Information Act* provide an advisory mandate to the Information Commissioner on proposed legislative initiatives.

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.
8. That the *Access to Information Act* apply to Cabinet confidences.
9. That the *Access to Information Act* require the approval of the Information Commissioner for all extensions to response times beyond 60 days.
10. That the *Access to Information Act* specify timeframes for completing administrative investigations.
11. That the *Access to Information Act* allow requesters the option of direct recourse to the Federal Court for access refusals.
12. That the *Access to Information Act* allow time extensions for multiple and simultaneous requests from a single requester.

The Committee studied these recommendations and heard from various witnesses. In June 2009, the Committee tabled a report that supported all but one recommendation and in most cases suggested that the Minister of Justice consider amending the *Access to Information Act* to implement the Commissioner's recommendations.[54]

The Committee did not support the Commissioner's recommendation that the *Access to Information Act* apply to Cabinet confidences. In its response, the Committee noted that there were disagreements among the witnesses about this recommendation and suggested that the Minister consider this recommendation in light of the arguments raised by the witnesses as well as the experience in other jurisdictions.

The Committee supported recommendation 2, which would amend the Act to allow all persons the right to request access to records under the *Access to Information Act*, but it strongly encouraged the Minister to consider cost-recovery options that would apply both to foreign users and to commercial users who resell the information for profit. The Committee also supported recommendation 4, which would provide the information Commissioner with discretion on whether to investigate complaints but also recommended the need to establish a clear and defined framework for the exercise of this power.

In the Government response to the Committee's report, the Minister of Justice, the Hon. Rob Nicholson, indicated the following:

> The *Access to Information Act* is a strong piece of legislation. It is crucial that careful consideration be given to the impact changes to the legislation may have on the operations of the ATI program. Legislative amendments must be examined in the context of administrative alternatives, such as enhanced guidance and training that can be equally effective to realize continued improvements. In this vein, Treasury Board Secretariat initiated a comprehensive review of policies and guidelines related to access to information with a view to clarify accountabilities and responsibilities of those involved in the access to information process. This resulted in a new *Policy on Access to Information*. We look forward to working with you and the members of the Committee in further improving the access to information program.[55]

4 SUMMARY OF REFORM PROPOSALS

A review of the major proposals for reform of Canada's access to information legislation, put forward during the Act's 26 years of operation, indicates several key features upon which there appears to be consensus, and also some on which the various reviewers have retained important differences of opinion.

Most of the proposals, in broad terms, agree on the need to expand the scope of the Act, to restrict exclusions and exemptions from the Act's coverage, and to reduce or eliminate the mandatory statutory exemptions currently provided under section 24 and in Schedule II. Within those broad areas of agreement, however, some important distinctions remain, as summarized below:

- **Title of the Act**

Many of the legislative proposals considered in this paper recommended changing the name of the Act to the "Open Government Act" to emphasize the purpose of the legislation. In the same spirit, they proposed the expansion of the "purpose" section of the Act to refer to the government's obligation to release information needed by Canadians.

- **Scope of the Act**

Regarding an expanded scope for the Act, almost all of the proposals recommended that the Act provide universal access to records, and none specifically rejected the extension of access to all persons, wherever they are located.[56] Under the majority of proposals, most Officers of Parliament would be subject to the Act, as would Parliament itself, except for the offices of individual Members of Parliament and Senators.[57] In 2006, the *Federal Accountability Act* partially addressed this issue by expanding the scope of the Act to include Crown corporations as well as Officers of Parliament. There is general consensus that the judiciary should not be subject to the right of access.[58]

- **Cabinet Records**

Most of the proposals recommended converting the current exclusion of Cabinet records or confidences into an exemption, and making decisions about refusals to disclose documents reviewable by the Information Commissioner[59] or the courts, or both. In 2005, the Justice Minister's *A Comprehensive Framework for Access to Information Reform* recommended retaining the exclusion of Cabinet confidences from the operation of the Act, while defining Cabinet confidences more narrowly and permitting the Federal Court to review the relevant determinations. In 2006, the discussion paper released by the Department of Justice on reform of the *Access to Information Act* proposed a different approach: it suggested that the exclusion of Cabinet confidences be maintained but that it be subject to review by the Information Commissioner. (While in the discussion paper the word "exclusion" was used in relation to Cabinet records,[60] the option of review suggests that the paper's authors favoured the conversion of the exclusion into an exemption.) Most other proposals[61] would have created a mandatory class exemption for Cabinet records, protecting all

such records from disclosure. Before 2006, all except the 2005 Framework proposed that Cabinet confidences be protected for a period of 15 years, rather than the current 20.[62] This issue has not been discussed since 2006.

- **Section 24 and Schedule II of the Act**

Most of the proposals recommended repealing section 24 and Schedule II of the Act. Neither the 2001 ad hoc MPs' Committee report nor the 2009 report of the House of Commons Standing Committee on Access to Information, Privacy and Ethics regarding the Information Commissioner's quick fixes dealt with the issue. Only the Minister of Justice, in his 2005 Framework paper, and the 2006 Department of Justice discussion paper recommended that the provisions be retained. The Framework proposed that criteria be established in order to reduce the number of statutory provisions on the Schedule II list. The discussion paper also suggested criteria and a review process to govern possible additions of provisions to the Schedule.

- **General Public Interest Override**

The concept of a general public interest override for exemptions was first endorsed by Information Commissioner John Reid in the "Open Government Act" that he proposed in 2005. In its 2006 discussion paper, the Department of Justice found the Commissioner's proposal too broad and suggested instead that a public interest override should not undermine the mandatory exemptions set out in section 13, subsection 16(3), section 19 and section 24 of the *Access to Information Act*, and the mandatory exemptions provided for Officers of Parliament in the *Federal Accountability Act*.

- **Duty to Document**

The creation of a positive duty requiring government officials and employees to document their decisions, actions, advice and recommendations was advocated by the Information Commissioner and included in his 2005 draft bill. This recommendation was highlighted by the Commissioner as one of his most important, as he intended it to reverse the move toward an oral culture of decision-making in government, which he argued had frustrated the goal of promoting the openness that underlies the access legislation. The 2006 Department of Justice discussion paper addressed this issue, noting that it would be necessary for the details of such a duty to be precise, so that public servants would have a clear understanding of what the duty entailed, especially if sanctions were to be applied for non-compliance. On an administrative level, a new directive on record-keeping was issued by the Treasury Board Secretariat in June 2009.[63]

- **Role of the Information Commissioner**

Recognition of the Information Commissioner's public education role and the role of access to information coordinators was recommended by the House of Commons Justice Committee in its 1987 report, by the Access to Information Review Task Force in its 2002 report[64] and by the Information Commissioner in his "Open

Government Act," proposed in 2005. These reviewers also recommended that new provisions provide for the elimination or waiving of some fees and a power to refuse frivolous or vexatious requests. In his 12 quick fixes tabled before the House of Commons Standing Committee on Access to Information, Privacy and Ethics in 2009, the Information Commissioner recommended that the Act be amended to provide the Commissioner with the discretion to determine whether to investigate complaints. The Committee supported this recommendation but insisted that the Commissioner's discretion be limited to cases that involve frivolous and vexatious complaints or situations where precedents related to the complaint had already been established by a previous investigation.

The 2005 proposed "Open Government Act" recommended that the Information Commissioner be given the power to order the release of information. The potential for changing the Commissioner's ombudsman model to an order-making one was discussed by the Access to Information Review Task Force in its June 2002 report, as an idea meriting consultation or study, and later by the Minister of Justice in the 2005 Framework paper.

A number of provinces have adopted an adjudicative, rather than ombudsman, model for their information and privacy commissioners. As noted in the Framework, transforming the Information Commissioner into a quasi-judicial decision-maker would affect the administration of the Commissioner's office, and the government has not thus far been convinced that there is a need for such a shift. In his appearance before the House of Commons Standing Committee on Access to Information, Privacy and Ethics in October 2005, Information Commissioner John Reid agreed, making the following argument in defence of his ombudsman role:

> There is no evidence that order powers would strengthen the right of access, speed up the process, or reduce the amount of secrecy. The experience of 22 years is that the ombudsman model works very well. Fewer than 1% of complaints end up before the courts. The experience in the jurisdictions that have order powers is that they rely heavily on the ombudsman approach, reserving the order-making role for the rare tough cases.[65]

Among his 2009 quick fixes, the Information Commissioner suggested that he be given partial order-making power for administrative complaints. The Committee supported this recommendation.

- **Five-Year Parliamentary Review**

The ad hoc MPs' Committee and the Information Commissioner's 2005 proposed "Open Government Act" both recommended that the amended Act provide for parliamentary review of its operation every five years.[66] This recommendation was also one of the quick fixes proposed by the Information Commissioner in 2009 and supported by the House of Commons Standing Committee on Access to Information, Privacy and Ethics in its 2009 report.

5 CONCLUSION: FROM ACCESS TO INFORMATION TO OPEN GOVERNMENT

While numerous proposals have been made to update the *Access to Information Act*, to date there has been no major reform of the legislation. Indeed, the start of the 41st Parliament saw the government take an alternate approach to improving access to government information, through "open government" and "open data" initiatives. The Speech from the Throne opening the 1st Session of the 41st Parliament contained the following:

> Our Government will also ensure that citizens, the private sector and other partners have improved access to the workings of government through open data, open information and open dialogue.[67]

The Canadian government's formal efforts to engage in open government and open data practices began at the end of the 40th Parliament when it launched an Open Government initiative at open.gc.ca in March 2011. At the time, the House of Commons Standing Committee on Access to Information, Privacy and Ethics was conducting a study on the subject of open government.[68] During his appearance before the Committee on 23 March 2011, just prior to the dissolution of the 40th Parliament, the Honourable Stockwell Day, then-President of the Treasury Board, noted, that open government "is a new approach to making information available. It's something that some other governments have done. It's something we have been doing in some departments, to a degree, and now we've brought it together all into one focus."[69]

In the 1st Session of the 41st Parliament, on 17 April 2012, the Honourable Tony Clement, President of the Treasury Board and Minister responsible for FedNor, announced Canada's membership in the international Open Government Partnership.[70] At the Annual General Meeting of the Partnership held in Brazil, Minister Clement presented Canada's "Open Government Action Plan" and endorsed the Partnership's declaration of principles as Canada's final steps toward membership in the Partnership.[71]

The Open Government Action Plan does not propose amendments to the *Access to Information Act*, but it commits the government to improving the administration of its access to information regime:

> To improve service quality and ease of access for citizens, and to reduce processing costs for institutions, we will begin modernizing and centralizing the platforms supporting the administration of Access to Information (ATI). In Year 1, we will pilot online request and payment services for a number of departments allowing Canadians for the first time to submit and pay for ATI requests online with the goal of having this capability available to all departments as soon as feasible. In Years 2 and 3, we will make completed ATI request summaries searchable online, and we will focus on the design and implementation of a standardized, modern, ATI solution to be used by all federal departments and agencies.[72]

Canada's information and privacy commissioners have suggested that the Action Plan on Open Government represents a missed opportunity for comprehensive reform of the *Access to Information Act*. In a January 2012 letter to Minister Clement

on behalf of Canada's information and privacy commissioners, Information Commissioner of Canada Suzanne Legault, offered to assist the government in developing the Action Plan. The letter suggested the government recognize and support the relationship between open government and a modernized *Access to Information Act*.[73] Further, in a speech to the Congress of the *Association sur l'accès et la protection de l'information* on 25 April 2012, the Information Commissioner made the following observation regarding the relationship between open government and the *Access to Information Act*:

> In 2013 the federal *Access to Information Act* will be 30 years old. Since 1977 there have been about 30 attempts – all fruitless – to reform or modernize it. …
>
> Our investigations in recent years have demonstrated not only the obsolescence of the statute, but also a number of deficiencies in it which may well impede or hamper the development of a truly open government that is receptive to the needs of its citizens and its economy and in step with other administrations.[74]

NOTES

1. Office of the Information Commissioner of Canada, "Strengthening the *Access to Information Act* to Meet Today's Imperatives: Presentation to the Standing Committee on Access to Information, Privacy and Ethics," March 2009.
2. The website of the Office of the Information Commissioner provides answers to frequently asked questions about using the *Access to Information Act*, including the complaint procedures.
3. House of Commons Standing Committee on Justice and Solicitor General [Justice Committee], *Open and Shut: Enhancing the Right to Know and the Right to Privacy – Report of the Standing Committee on Justice and Solicitor General on the Review of the* Access to Information Act *and the* Privacy Act, Queen's Printer of Canada, Ottawa, 1987.
4. An "injury test" is a consideration of "the harm to the interest (e.g., the conduct of international affairs) that could reasonably be expected to result from disclosure." Access to Information Review Task Force [AIRTF], *Access to Information: Making It Work for Canadians – Report of the Access to Information Review Task Force*, 2002.
5. These are the offices of the following: the Auditor General of Canada, the Commissioner of Official Languages, the Chief Electoral Officer of Canada, the Information Commissioner of Canada, and the Privacy Commissioner of Canada. Generally speaking, the term "Officers of Parliament" is used in different contexts to mean different things, but for the purposes of this paper it includes the five positions mentioned above.
6. House of Commons Justice Committee (1987), *Appendix B: Committee's Report on S. 24*, 19 June 1986, p. 113.
7. The three statutes were the *Income Tax Act*, the *Statistics Act*, and the *Corporations and Labour Unions Returns Act* (later renamed the *Corporations Returns Act* and then repealed in 1998).
8. Government of Canada, *Access and Privacy: The Steps Ahead*, 1987.
9. MPs' Committee on Access to Information [ad hoc MP's Committee], *A Call for Openness*, Ottawa, November 2001.

10. In a letter attached to the report, two Bloc Québécois MPs (Paul Crête and Claude Bachand) made several additional proposals.

11. The ad hoc MPs' Committee recommended that the Act not apply to the judiciary.

12. A class exemption excludes all documents in a certain class (i.e., fitting a specific definition under the Act) from the operation of the Act.

13. Bill C-36, an Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities in order to combat terrorism, received Royal Assent on 18 December 2001 and came into force in three stages between 24 December 2001 and 6 January 2003.

14. All but one of the task force members came from federal government departments. The exception was a representative of the Government of Newfoundland and Labrador.

15. AIRTF (2002).

16. Ibid., Recommendation 2-1.

17. Information Commissioner of Canada, *Response to the Report of the Access to Information Review Task Force: A Special Report to Parliament*, Minister of Public Works and Government Services Canada, Ottawa, 2002, p. 19.

18. Information Commissioner of Canada (2002).

19. AIRTF (2002), Recommendation 3-5.

20. The recommendation would also bring the five Offices of Parliament listed in footnote 5 under the Act.

21. Information Commissioner of Canada (2002), p. 64.

22. Earlier private Members' bills proposing amendments to the *Access to Information Act* are not discussed in this paper. For example, Bill C-208 (passed in 1998) amended the *Access to Information Act* to make it an offence for anyone to destroy, mutilate, alter, falsify or conceal a record with intent to deny a right of access. See Bill C-208, An Act to amend the Access to Information Act, 1st Session, 36th Parliament, 25 March 1999. Bill C-206, an earlier comprehensive reform package proposed by MP John Bryden, was defeated. See Bill C-206, An Act to amend the Access to Information Act and to make amendments to other Acts, 2nd Session, 36th Parliament, First reading, 14 October 1999.

23. Bill C-462, An Act to amend the Access to Information Act and to make amendments to other Acts, 2nd Session, 37th Parliament, First reading, 28 October 2003.

24. Bill C-201, An Act to amend the Access to Information Act and to make amendments to other Acts, 1st Session, 38th Parliament, First reading, 7 October 2004. Bills C-462 and C-201 were identical except that clauses 36 and 37 of the first bill were not included in the second, as they dealt with coordinating amendments related to two bills that were before Parliament in 2003, and were subsequently passed.

25. The bill would have amended Schedule I to add, in addition to the organizations already listed, any department or ministry of state of the federal government, as well as a Crown corporation or a wholly owned subsidiary of a Crown corporation as defined in the *Financial Administration Act*, and any incorporated not-for-profit organization that receives at least two thirds of its financing through federal government appropriations.

26. Department of Justice, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, April 2005.

27. House of Commons, Standing Committee on Access to Information, Privacy and Ethics [House of Commons Committee on Access to Information], *Evidence*, 1st Session, 38th Parliament, 5 April 2005 (Honourable John Reid, Information Commissioner).

28. Ibid., 0910.

29. The Crown corporations are the Canada Development Investment Corporation, the Canadian Race Relations Foundation, the Cape Breton Development Corporation, the Cape Breton Growth Fund Corporation, the Enterprise Cape Breton Corporation, the Marine Atlantic Inc., the Old Port of Montreal Corporation Inc., the Parc Downsview Park Inc., the Queens Quay West Land Corporation, and Ridley Terminals Inc. See Department of Justice (2005), pp. 5–6.

30. The 10 Crown corporations were added to Schedule I of the Act by Order in Council in August 2005, p. C.O. 2005-1489/SOR2005-251.

31. These Crown corporations are Atomic Energy of Canada Ltd., Canada Post Corporation, the Canadian Broadcasting Corporation, Export Development Canada, the National Arts Centre Corporation, the Public Sector Pension Investment Board, and Via Rail Canada Inc. See Department of Justice (2005), p. 6.

32. The proposed definition would focus on information or communications that reveal the substance of Cabinet's deliberations, decisions and submissions. See Department of Justice (2005), p. 14.

33. Department of Justice (2005), pp. 15–16.

34. Information Commissioner of Canada, *Proposed Changes to the* Access to Information Act*: Presentation to the Committee on Access to Information, Privacy and Ethics*, September 2005.

35. Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations*, Minister of Public Works and Government Services, 2006.

36. Ibid., Recommendation 16.

37. The current Schedule II would be repealed.

38. *Canada (Information Commissioner)* v. *Canada (Minister of National Defence)* (F.C.), 2008 FC 766, (2008), [2009] 2 F.C.R. 86. See also Office of the Information Commissioner of Canada, "Information Commissioner appeals a Federal Court decision that limits the scope of the *Access to Information Act*," News release, 21 July 2008.

39. Under section 10(3) of the *Access to Information Act*, where the head of the government institution fails to provide access within a time limit, he or she is deemed to have refused access.

40. House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Session, 38th Parliament, 25 October 2005, 1110 (Honourable John Reid, Information Commissioner.

41. Special majority provisions in Canadian legislation are uncommon, and while they may be effective, there may be an argument that only simple majority votes of Parliament are constitutional.

42. Bill C-554, An Act to amend the Access to Information Act (open government), 2nd Session, 39th Parliament, First reading, 29 May 2008.

43. Bill C-556, An Act to amend the Access to Information Act (improved access), 2nd Session, 39th Parliament, First reading, 2 June 2008.

44. Bill C-326, An Act to amend the Access to Information Act (open government), 2nd Session, 40th Parliament, First reading, 25 February 2009.

45. Bill C-301, An Act to amend the Access to Information Act (open government), 1st Session, 41st Parliament, First reading, 29 September 2011.

46. The motion was carried on division. See House of Commons, *Journals*, 1st Session, 38th Parliament, 15 November 2005.

47. House of Commons Standing Committee on Access to Information, Privacy and Ethics, *Seventh Report*, 1st Session, 38th Parliament, 21 November 2005.

48. *Federal Accountability Act* (S.C. 2006, c. 9).

49. For an in-depth analysis of the amendments, see *Bill C-2: The Federal Accountability Act*, LS-522E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 December 2006.

50. Government of Canada, *Strengthening the* Access to Information Act *– A Discussion of Ideas Intrinsic to the Reform of the* Access to Information Act, 11 April 2006.

51. Information Commissioner of Canada, *Response to the Government's Action Plan for Reform of the* Access to Information Act*: A Special Report to Parliament*, April 2006.

52. Ibid.

53. Office of the Information Commissioner (2009).

54. House of Commons Standing Committee on Access to Information, Privacy and Ethics, *The* Access to Information Act*: First Steps Towards Renewal*, Eleventh report, 2nd Session, 40th Parliament, June 2009.

55. The Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, "Eleventh Report of the Standing Committee on Access to Information, Privacy and Ethics entitled *The Access to Information Act: First Steps Towards Renewal*," Government Response, 2nd Session, 40th Parliament, n.d.

56. Bills C-462 and C-201 did not include such an amendment, and the recommendations of the ad hoc MPs' Committee on Access to Information did not address this issue.

57. Bills C-462 and C-201 would not have brought Parliament under the Act, and the April 2005 *A Comprehensive Framework for Access to Information Reform* presented by the Justice Minister urged the House of Commons Standing Committee on Access to Information, Privacy and Ethics to undertake consultation with affected parties about the potential addition of Parliament and Officers of Parliament. In its 2006 discussion paper, the Department of Justice expressed the need for protection (or exclusions) for parliamentary privileges, among other things. In its 2009 report, the Committee also recognized the necessity to protect parliamentary privileges.

58. In his proposed quick fixes of 2009, the Information Commissioner suggested that the Act be extended to include records related to the administration of the courts. The Committee supported this recommendation subject to provisions protecting judicial privileges.

59. The Task Force would have excluded the Commissioner from review of these decisions, reserving such review for the courts.

60. The discussion paper stated that "it may be wise to maintain the exclusion for Cabinet confidences, which is consistent with the current Government's commitment that it would subject the exclusion of Cabinet confidences to review by the Information Commissioner." See Government of Canada (2006), p. 9.

61. The exception is the 2001 ad hoc MPs' Committee on Access to Information, which recommended that an injury-based discretionary exemption be created to preserve the confidentiality of Cabinet deliberations. See MPs' Committee on Access to Information [2001], Recommendation 6.

62. The Access to Information Review Task Force found the reduced period of 15 years reasonable and asked the government to consider the reduction. See AIRTF (2002), Recommendation 4-6.

63. Treasury Board of Canada Secretariat, *Directive on Recordkeeping*, 1 June 2009.

64. The Access to Information Review Task Force recommended that the role of access coordinators be recognized in the Access to Information Policy and Guidelines, rather than in the statute.

65. House of Commons Committee on Access to Information (25 October 2005), 1110.

66. The 1987 report of the House of Commons Standing Committee on Justice called for a parliamentary review of the *Access to Information Act* and the *Privacy Act* within four years after the tabling of the report.

67. Government of Canada, "Speech from the Throne," 1st Session, 41st Parliament, 3 June 2011.

68. The Committee heard testimony from numerous witnesses between November 2010 and March 2011. Transcripts of the meeting are available on the Committee website.

69. House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 3rd Session, 40th Parliament, 23 March 2011, 1710 (Honourable Stockwell Day, President of the Treasury Board).

70. Open Government Partnership, *About*. The Partnership defines itself as "a new multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance." To become a member, each participating country must embrace a high-level Open Government Declaration, deliver a country action plan developed with public consultation, and commit to independent reporting on progress.

71. Treasury Board of Canada Secretariat, "Canada Joins International Open Government Partnership," News release, 18 April 2012.

72. Government of Canada, *Canada's Action Plan on Open Government*, 11 April 2012.

73. Information Commissioner of Canada, "Letter on open government for the President of the Treasury Board," 20 January 2012.

74. Information Commissioner of Canada, "Address by Suzanne Legault, Information Commissioner of Canada Congress of the Association sur l'accès et la protection de l'information (AAPI)," Quebec City, 25 April 2012.