THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Privacy Act Amendments

CANADIAN BAR ASSOCIATION
PRIVACY AND ACCESS LAW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Privacy and Access Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Privacy and Access Law Section.

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EXECUTIVE SUMMARY

The CBA Privacy and Access Law Section (the CBA Section) appreciates the opportunity to comment on the recommendations from the Privacy Commissioner of Canada for amendments to the *Privacy Act*.

The Canadian Bar Association is a national association representing approximately 36,000 jurists across Canada, including lawyers, notaries, law teachers and students, and its primary objectives include improvements in the law and the administration of justice. The CBA Section comprises lawyers with in-depth knowledge of privacy law and access to information. The CBA Section notes the importance of amending the *Privacy Act* in coordination with amending the *Access to Information Act*. Both statutes have been treated as a package since they were enacted and there are compelling reasons to continue doing so.

We also indicate the importance of reviewing the *Privacy Act* with other elements of the 'information rights' regime that determine to what extent Canadians have robust privacy protection when they entrust their personal information to government institutions. This includes the role and work of the Treasury Board, the Office of the Privacy Commissioner (OPC), ATIP coordinators and the extent to which they are trained and supported in their essential work.

The CBA Section supports many of the 16 changes recommended by the Privacy Commissioner in his March 22, 2016 letter to the Access to Information, Privacy and Ethics Committee. In fact, a number of those changes have been championed by the CBA Section in past submissions.

Specifically, the CBA Section supports the following recommendations identified by the Privacy Commissioner:

1. Clarify requirements for information-sharing agreements.
2. Create a legal obligation for government institutions to safeguard personal information.
3. Make breach reporting mandatory.

4. Create an explicit necessity requirement for collection.
5. Expand judicial recourse amend remedies under section 41 of the Act.
7. Require government institutions to conduct privacy impact assessments (PIAs) for new or significantly amended programs and submit them to OPC prior to implementation.
9. Provide OPC with an explicit public education and research mandate.
10. Require an ongoing five year review of the *Privacy Act.*
11. Grant the Privacy Commissioner discretion to publicly report on government privacy issues when in the public interest.
12. Expand the Privacy Commissioner's ability to share information with counterparts domestically and internationally to facilitate enforcement collaboration.
13. Provide the Privacy Commissioner with discretion to discontinue or decline complaints in specified circumstances.
14. Strengthen transparency reporting requirements for government institutions.
15. Extend coverage of the *Privacy Act.*

The CBA Section also comments on the remaining three recommendations identified by the Privacy Commissioner:

6. Improve the ombudsman model for the investigation of complaints

   The CBA Section agrees that the existing ombudsman model needs some change. Over thirty years of experience show that the ombudsman model limits the ability to ensure a robust privacy regime in the public sector. There is no clear consensus in the CBA Section on whether that change should be to an 'enhanced ombudsman model' or to an 'administrative tribunal model'. If the Privacy Commissioner's recommendation is accepted to adopt an enhanced ombudsman model, there should be a detailed review of the advantages and disadvantages of that model in practice when the Privacy Act is reviewed in five years.

8. Require government institutions to consult with the OPC on draft legislation and regulations with privacy implications before they are tabled:

   The CBA Section supports the practice of advance consultation but questions whether it is appropriate to be a statutory requirement.

16 Limit exemptions to access to personal information requests under the Act

   There is no clear consensus in the CBA Section but we suggest some general criteria that Parliament apply in considering this recommendation.

I. INTRODUCTION

The CBA Privacy and Access Law Section (the CBA Section) appreciates the opportunity to comment on the recommendations from the Privacy Commissioner of Canada to amend the

Privacy Act. Sixteen recommendations were in the Commissioner's letter of March 22, 2016 to the Access to Information, Privacy and Ethics Committee.

The Canadian Bar Association is a national association representing approximately 36,000 jurists across Canada, including lawyers, notaries, law teachers and students, and its primary objectives include improvements in the law and the administration of justice. The CBA Section comprises lawyers with in-depth knowledge in the areas of privacy law and access to information.

Our comments are informed by several policy statements of the CBA and the CBA Section:

- *Privacy Act* Reform, submission to Access to Justice, Privacy and Ethics Committee, June 2008[1]
- CBA Resolution 12-01-M, *Privacy Act* amendments, February 2012[2]
- Letter to Minister of Justice on Privacy Act amendments, June 2012[3]
- Letter to Innovation, Science and Economic Development Canada on draft data breach requirements in Personal Information Protection and Electronic Documents Act (PIPEDA), May 2016.[4]

We also commend a June 2006 report of the Office of the Privacy Commissioner, *Government Accountability for Personal Information – Reforming the Privacy Act*,[5]

II. GENERAL COMMENTS

We agree with the observation at page 2 of the June 2006 report of the Privacy Commissioner, *Government Accountability for Personal Information – Reforming the Privacy Act*:

> the federal government holds the private sector to a higher standard than it imposes on its own operations involving the collection, use and disclosure of personal information. This is problematic, particularly in light of the fact that the Canadian government has gained extraordinary powers over the informational privacy of

1 http://www.cba.org/CMSPages/GetFile.aspx?guid=96887b91-f533-4047-9aa4-246ff93b83bb

2 http://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2012/Privacy-Act-Amendment/12-01-M-ct.pdf

3 http://www.cba.org/CMSPages/GetFile.aspx?guid=8ddd0a82-df12-48ac-a314-c5e521b9e5d6

4 http://www.cba.org/CMSPages/GetFile.aspx?guid=5a31ab7e-f0bc-4981-80aa-b43975cd7dd2

5 Office of the Privacy Commissioner of Canada 2006. Available online at Privacy Commissioner of Canada at https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-privacy-act/pa_r/pa_reform_060605/

> citizens through a series of legislative measures and changes in machinery of government, particularly in national security.[6]

The disparity in the level of privacy protection between public and private sectors is even more pronounced with the passage of the *Digital Privacy Act* and its suite of amendments to PIPEDA.

We also agree with the observation of the former Privacy Commissioner:

> The urgency of reforming the Privacy Act increases with each passing year. What is needed is legislation that is responsive to the complexities of contemporary governance, provides an effective framework to minimize the risks to informational privacy in the face of new technologies, enables public accountability, and allows Parliament to fully assume its role of guardian of our fundamental values, including the right of informational privacy [p. 5][7]

An initial concern is that amendments to the *Privacy Act* not be addressed independently of needed amendments to the *Access to Information Act*. The two statutes were developed and presented to Parliament as a package – a 'seamless code' in the form of two complementary bills. The courts have repeatedly stressed that the two acts need to be read together. Access to Information and Privacy (ATIP) Coordinators in each federal government department routinely deal with both statutes. The process to obtain access to personal information is prescribed not in the *Access to Information Act* but in the *Privacy Act*. Finally, neither statute has been substantially amended in 34 years.

The linkage and mirror features of the two statutes are reflected in the fact that our CBA Section is titled the Privacy *and* Access Law Section.

A further concern is the need to address contemporaneously the supporting infrastructure for the federal privacy and access to information with legislation reform. More than 30 years of experience with access and privacy laws in Canada dictate that we cannot achieve a truly robust set of information rights if we focus exclusively on the enabling statute. The access and privacy infrastructure includes the role and work of the Treasury Board, the role and work of ATIP Coordinators, the Open Government initiative and a host of administrative and procedural matters that directly and indirectly affect individuals asserting their information rights under either or both statutes. The larger infrastructure was considered at length in the Treasury Board 2002 report of the Access to Information Review Task Force, *Access to*

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6 Privacy Commissioner, supra, note 1 at 6

7 Privacy Commissioner, supra, note 1 at 5

Information: Making it work for Canadians. Consideration of those other elements of the federal information rights regime is essential for any *Privacy Act* reform.

III. PAST CBA SECTION REPRESENTATIONS

In a June 20, 2012 letter to the then Minister of Justice, the CBA Section stated:

> The CBA is a longstanding supporter of the need for the federal government to undertake a comprehensive review of the *Privacy Act*, in light of the dramatic technological and societal changes over the roughly three decades since the legislation was enacted.

In 2004, the CBA urged the federal government to strengthen its privacy legislation, practices and policies by establishing strict safeguards and mechanisms for accountability and public oversight, to balance privacy and individual liberties with a demonstrated need for the information and to limit state intrusion into the lives of Canadians to the greatest extent possible.

In 2006, CBA urged the federal government to initiate a comprehensive consultation and review process to modernize the *Privacy Act* to increase the privacy protection it affords to Canadians. We commented that the collection, use and disclosure of personal information by federal institutions should be balanced and well-considered to minimize the infringement of personal privacy and civil rights in a free and democratic society. We noted several deficiencies in the *Privacy Act*, including limitations in its scope, limitations of the right of access, the extent of permitted disclosures by federal institutions, limited enforcement powers for the Privacy Commissioner and more limited remedies.

IV. CBA SECTION COMMENTARY ON OPC RECOMMENDATIONS

Our comments follow the structure in the Privacy Commissioner's March 22, 2016 letter.

A. Theme One: Technological Changes

1. Clarify requirements for information-sharing agreements

In its June 2008 submission, the CBA Section recommended that the *Privacy Act* be amended to permit federal institutions to link personal records in computer systems only if the linkage would not reasonably be expected to harm individuals whose information is being disclosed,

and if the benefits to be derived from the linkage or research are in the public interest or demonstrably necessary, and under the ongoing oversight of the Privacy Commissioner.

The first of the ten principles in the *Model Code for the Protection of Personal Information* is **accountability**.[8] Meaningful accountability for the collection, use and disclosure of personal information requires written information-sharing arrangements between multiple organizations. The Privacy Commissioner and the Information and Privacy Commissioners of British Columbia and Alberta describe this as "a minimum privacy requirement".[9] These information sharing agreements should be transparent to individuals. With the proliferation of organizations sharing personal information and the increased contracting-out of information management services, more rigour in these arrangements is essential.

The CBA Section supports a requirement in the *Privacy Act* that information sharing be codified and accessible to data subjects. This would include a requirement proposed by the Privacy Commissioner in 2006 that disclosure of personal information to a foreign government must be subject to a formal written agreement or arrangement and must contain the following elements:

- A description of the personal information to be shared
- The purposes for which the information is being shared and is being used
- A statement of all the administrative, technical and physical safeguards required to protect the confidentiality of the information, especially in regard to its use and disclosure
- A statement specifying whether information received by the federal government would be subject to the provisions of the *Privacy Act*
- A statement specifying whether information disclosed by the federal government would be subject to the provisions of the *Privacy Act*
- The names, titles and signatures of the appropriate officials in both the supplying and receiving institutions and the date of the agreement.

2. Create a legal obligation for government institutions to safeguard personal information

In its June 2008 submission, the CBA Section recommended that the *Privacy Act* impose a general duty on federal institutions to protect personal information that they hold with safeguards appropriate to the sensitivity of the information. First generation privacy laws such as the *Privacy Act* were enacted prior to the digital transformation. We acknowledge

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8 S.C. 2000 c. 5, Schedule 1, 4.1 Principle 1 - Accountability

9 Getting Accountability Right with a Privacy Management Program available at www.priv.gc.ca

subsequent efforts by Treasury Board and government institutions to construct policy and prescribed contractual language to require safeguards. Those efforts have been inadequate to signal to public servants and the public the serious risk of loss, theft or misuse of personal information in digital form.

A feature common to many other Canadian privacy laws, both public sector and private sector, is to require the organization to create reasonable safeguards to protect personal information including administrative, technical and physical safeguards.

3. Make breach reporting mandatory

In its June 2008 submission the CBA Section recommended that the *Privacy Act* be amended to contain a breach notification requirement that federal institutions notify individuals if their personal information has been improperly disclosed. This requirement should adopt a balanced approach, and be at least as stringent as any breach notification regime imposed on private businesses under PIPEDA.

This would entail establishing the threshold for notification to individuals and to the Privacy Commissioner as a "real risk of significant harm". This is essentially the same threshold test used in private sector privacy law in Alberta[10] and in the public sector law in Newfoundland and Labrador.[11] The same test has been recommended for inclusion in the British Columbia Freedom of Information and Protection of *Privacy Act*[12] and the *Personal Information Protection Act*[13] by legislative committees.

This issue is discussed in greater detail in the 2016 CBA Section submission to Innovation, Science and Economic Development Canada on draft data breach requirements in PIPEDA.

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10 S.A. 2003, c.P-6.5, s. 34.1

11 SNL 2015, C. A-12, s. 64.3

12 Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act. Available online at https://www.leg.bc.ca/content/CommitteeDocuments/40th-parliament/5th-session/foi/Report/SCFIPPA_Report_2016-05-11.pd

13 Report of the Special Committee to Review the Personal Information Protection Act. Available online at: https://www.leg.bc.ca/content/CommitteeDocuments/40th-parliament/3rd-session/pipa/reports/PDF/Rpt-PIPA-40-3-Report-2015-FEB-06.pdf

B. Theme Two: Legislative Modernization

4. Create an explicit necessity requirement for collection

In its June 2008 submission, the CBA Section recommended that the *Privacy Act* be amended to require federal institutions to identify the specific purpose for collecting personal information and to ensure that the information is reasonably necessary for the articulated purpose or is authorized by law. The inadequacy of the existing provision is apparent when compared with the comprehensive principles in PIPEDA.

5. Expand judicial recourse and remedies under section 41 of the Act

In its June 2008 submission, the CBA Section recommended that the *Privacy Act* be amended to provide Federal Court oversight and a remedy for individuals with grievances under the Act.

6. Improve the ombudsman model for the investigation of complaints

There are currently three different models for privacy oversight in Canadian jurisdictions:

1. Ombudsman model – Commissioner/Ombudsman has power to investigate complaints about privacy but is restricted to attempting to mediate the dispute or issue recommendations to the relevant public body. No order-making power is vested in the oversight body. This is the model in Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Yukon and Northwest Territories and Nunavut.
2. Administrative tribunal – This Commissioner model includes order-making power. If mediation or informal resolution of a complaint is not possible, the Commissioner can issue a binding order. The order can be registered with the superior court in the jurisdiction and then enforced against the public body. This is the model in Ontario, British Columbia, Alberta, Quebec and Prince Edward Island.
3. Enhanced ombudsman model – This is a recent variation of the Ombudsman model in which the Commissioner has order-making power for matters such as obtaining copies of the subject record, submissions from public bodies and procedural matters, but not for complaints. Instead, there is a process by which the Commissioner's findings and recommendations, if neither challenged nor complied with, can be entered and enforced as a court order. This approach was recommended by the *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*[14] in Newfoundland and Labrador and

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14 Clyde Wells, Doug Lewtto, Jennifer Stoddart, Report of the 2014 Statutory Review Access to Information and Protection of Privacy Act Newfoundland and Labrador. Available online at http://www.gov.nl.ca/publications/index.html

> enacted in the *Access to Information and Protection of Privacy Act, 2015*[15] of Newfoundland and Labrador.

We understand that the Privacy Commissioner is recommending adoption of the enhanced ombudsman model in the *Privacy Act.*

Shortcomings in the current ombudsman model have been identified over the history of the *Privacy Act*. We believe the enhanced ombudsman model would bring a significant improvement in privacy compliance. It would impose a new kind of discipline on government institutions.

In making this recommendation, we are mindful that the administrative tribunal model has been viewed as effective and efficient in provinces like British Columbia, Quebec and Alberta. We also recognize that the experience with order-making powers is that it can result in a significant number of judicial review applications and associated legal costs for the commissions. There may also be a different perception of the commissions and more antagonism in dealings between the commissioner's office and other government institutions.

A consequential concern is what power the Information Commissioner of Canada would have and whether the two oversight offices will have substantially different powers and roles. The Information Commissioner has recommended that her office become an administrative tribunal with order-making power.

The CBA Section recommends the same oversight and enforcement model apply to both the Privacy Commissioner and the Information Commissioner, given their related roles.

If the Privacy Commissioner's preference for the enhanced ombudsman model is accepted, we encourage careful assessment of the impact of that change and a thorough review of it in the recommended five year review of the legislation.

Some might question whether the *Privacy Act* should be similar to PIPEDA. There certainly are features of PIPEDA that should be considered for inclusion in the *Privacy Act*. This includes an explicit duty to safeguard personal information, breach notification requirements, a broad definition of personal information and the ability to consult with data protection authorities both in Canada and internationally. Beyond those kinds of requirements that are equally applicable whether dealing with the public sector or the private sector, important differences in the two laws should be recognized.

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15 SNL 2015 c. A-1.2

Accountability will look different for government institutions than for private businesses. With government institutions, accountability is through the head of the institution but there is also ministerial accountability. With privacy breaches or other violations of the *Privacy Act*, the Minister responsible can be held to account through Parliament, including oral questions, written questions and motions for return and hearings by Parliamentary committees. With private businesses, there isn't Ministerial accountability, but unlike public services, there is competition, customers and clients can choose their service provider. If anyone is aggrieved by the privacy lapses or violations of a business they deal with, they can change their provider.

Furthermore, PIPEDA is consent based. Consent is a condition precedent to most collection, use and disclosure practices covered by PIPEDA. The *Privacy Act* is, for the most part, not consent based. Instead the practice of government institutions has been and continues to be to rely on their statutory authority to collect, use and disclose. Statutory authority allows collection without consent so long as it relates to a program or activity of the institution. Use and disclosure of personal information does not require consent provided that the use or disclosure is "for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose".

The model determined by Parliament as the appropriate replacement to the existing Ombudsman model should explicitly empower the Privacy Commissioner to ask the court to review a complaint of improper government collection, use or disclosure of personal information. Currently the Privacy Commissioner is restricted to requesting a review of a complaint that access has been improperly denied.

Also, the mandate of the OPC should allow the Privacy Commissioner to engage in mediation and conciliation, powers already afforded the Privacy Commissioner under PIPEDA in s. 12.1(2).

7. Require government institutions to conduct privacy impact assessments (PIAs) for new or significantly amended programs and submit them to OPC prior to implementation

In its June 2008 submission the CBA Section recommended that the *Privacy Act* be amended to require public bodies to conduct PIAs prior to the development of any new programs and policies which involve the collection, use or disclosure of personal information.

A requirement to provide the completed PIA to the Privacy Commissioner would be an important feature of the *Privacy Act*. In Alberta, the *Health Information Act* (HIA) requires custodians considering new programs or systems for the collection, use or disclosure of

personal health information to conduct PIAs. HIA also requires that the PIA be submitted to the Information and Privacy Commissioner for review. This feature gives this Commissioner's office a unique understanding of new technologies at the point of service. That office has the opportunity to track trends and privacy-impacting developments more effectively.

A mandatory privacy impact assessment requirement is in the new Newfoundland and Labrador *Access to Information and Protection of Privacy Act.* The requirement is that the PIA be submitted to the Minister responsible for the *Access to Information and Protection of Privacy Act* for the Minister's review and comment unless the government institution "provides the results of a preliminary assessment showing that a privacy impact assessment of the program or service is not required". [s. 72(1)(b)] In the case of a common or integrated program, the statute requires that the Information and Privacy Commissioner be notified "at an early stage of developing the program or service". In addition, that PIA for the common or integrated program must be submitted to the Commissioner for review and comment.

A PIA can be a significant undertaking and we commend the Newfoundland and Labrador approach. This approach states that if there is no significant involvement of personal information in a proposed program or service and a PIA is not reasonably necessary, no PIA is required.

Some may question what the consequences would be if a government institution failed to undertake a PIA, if that becomes a requirement under the *Privacy Act*. The consequences would need to be determined by Parliament. The penalty might take the form of a declaration of non-compliance by the Privacy Commissioner or a report to Parliament. The notoriety of being in violation of a *Privacy Act* obligation may create its own discipline to minimize flouting the requirement. The matter could be referred to the court, which could be authorized to issue a fine for non-compliance. Alternatively, the Privacy Commissioner could have authority to assess an administrative penalty for non-compliance.

Section 68 of the *Privacy Act* contains the only offence provision:

> 68. (1) No person shall obstruct the Privacy Commissioner or any person acting on behalf or under the direction of the Commissioner in the performance of the Commissioner's duties and functions under this Act.
>
> (2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars.

8. Require government institutions to consult with OPC on draft legislation and regulations with privacy implications before they are tabled

Consultation with OPC is important and desirable to achieve a full and complete analysis of the privacy implications of proposed legislation or subordinate legislation. The experience in Canadian jurisdictions over the last 30 plus years is that consultation has served to identify privacy issues and contribute to mitigation strategies to enhance privacy protection.

At the same time it may be challenging to codify consultation in legislation. A host of other considerations and practical concerns may be associated with a prescribed duty to consult. In any event, assuming that a duty to consult can be realistically incorporated into the *Privacy Act*, the CBA Section would support the feature.

9. Provide OPC with an explicit public education and research mandate

In its June 2008 submission the CBA Section supported the recommendation of the then federal Privacy Commissioner that the *Privacy Act* be amended to give the Privacy Commissioner a clear public education mandate. Many public sector privacy statutes authorize commissioners to engage in public education. The mandate is given the Privacy Commissioner in PIPEDA s. 24. This public education work has been valuable and improved public awareness of the privacy rights of Canadians.

10. Require an ongoing five year review of the Privacy Act

In its June 2008 submission the CBA Section supported the then Privacy Commissioner's recommendation that the *Privacy Act* be reviewed by a Committee of the House of Commons every five years, as in section 29 of PIPEDA.

C. Theme 3: Enhancing Transparency

11. Grant the Privacy Commissioner discretion to publicly report on government privacy issues when in the public interest

Subsection 20(2) of *PIPEDA* allows the Privacy Commissioner to make public any information that comes to his knowledge in the performance or exercise of any of his duties or powers when "in the public interest".

In the June 2008 submission, the CBA Section discussed the inadequacies of the reporting mechanisms of the *Privacy Act* that were "clearly a matter of concern for an inadvertent privacy breach involving personal information".

In that same submission we considered the concern expressed by the then Privacy Commissioner that no specific section authorizes the Privacy Commissioner to make public interest disclosures under the *Privacy Act*.

The *Federal Accountability Act* made no changes to the *Privacy Act* that govern the Commissioner's authority to initiate a public release of its investigation activities and findings. As a result, the only clear legislative vehicles available to the OPC for public reporting purposes are the annual and special reporting provisions.

In its June 2008 submission the CBA Section supported the intent underlying these two recommendations, but cautions that they are likely to have limited impact. The current reporting obligations for federal institutions leave much to be desired, particularly where a federal institution has experienced a privacy breach and personal information has been inadvertently or improperly disclosed. There is simply no "real time" obligation on federal institutions or the Privacy Commissioner to advise individuals affected by a breach so they may take appropriate steps to mitigate possible adverse consequences.

12. Expand the Privacy Commissioner's ability to share information with counterparts domestically and internationally to facilitate enforcement collaboration

We recommend that the Privacy Commissioner have the same jurisdiction under the *Privacy Act* as he does under PIPEDA. Section 23 of PIPEDA authorizes the Privacy Commissioner to consult and share information with provincial and territorial data protection authorities. Section 23 of PIPEDA also authorizes consultation and information sharing with international data protection authorities.

This amendment reflects the reality that contemporary data routinely moves over borders and between different jurisdictions anywhere in the world. Effective enforcement of privacy rights must allow for cooperative approaches with other data protection authorities and privacy commissioners.

A 2016 amendment to Alberta's *Health Information Act* allows the Information and Privacy Commissioner to exchange information with an extra-provincial commissioner and enter information sharing and other agreements with extra-provincial commissioners for the purpose of coordinating activities and handling complaints involving two or more jurisdictions. (s. 84(1)(j))

13. Provide the Privacy Commissioner with discretion to discontinue or decline complaints in specified circumstances

The new section 12.2 of PIPEDA gives the Privacy Commissioner the discretion to discontinue an investigation into a breach of privacy complaint in specified circumstances. There is no corresponding provision in the *Privacy Act.*

In 2012, the CBA urged the federal government to amend the *Privacy Act* to give the Privacy Commissioner discretion to decline complaints or discontinue investigations based on certain criteria, for example those that are trivial, frivolous, vexatious, made in bad faith, supported by insufficient evidence, have been dealt with already by the Commissioner or are better resolved in a different forum.

The CBA Section offered the following factors in support of the proposed amendment:

- Taxpayer dollars should not be spent investigating complaints under the *Privacy Act* that are trivial, frivolous, vexatious, made in bad faith, supported by insufficient evidence, have been dealt with already by the Privacy Commissioner or are better resolved in a different forum. Such investigations serve no purpose, do not further the objectives of the legislation and drain precious resources away from complaints that raise systemic or other privacy issues of importance to all Canadians.
- The Privacy Commissioner already has a similar discretionary power under privacy legislation in the private sector, the *PIPEDA.*
- Most provincial and territorial privacy and access laws contain similar discretionary powers to allow officials to decline complaints or discontinue investigations.
- The Privacy Commissioner has requested this power, in order to better allocate resources to complaints that raise systemic issues affecting all Canadians.
- The proposed amendment would bring the Privacy Act into closer alignment and consistency with the powers under similar private and public sector laws in Canada.
- The proposed amendment would help achieve the important purposes of the Privacy Act in a manner that maximizes the efficient use of the Privacy Commissioner's limited resources.

In its June 2008 submission the CBA Section recommended that a section comparable to what was then section 13(2) of the PIPEDA be added to the *Privacy Act* so the Privacy Commissioner may use discretion not to prepare a report in specific circumstances.

14. Strengthen transparency reporting requirements for government institutions

The CBA Section supports the proposal to strengthen reporting requirements on broader privacy issues dealt with by federal organizations. We also endorse the call for heightened transparency with respect to so-called 'lawful access' requests made to internet service providers and other custodians of customer communications data.

15. Extend coverage of the Privacy Act

The CBA Section supports expanding the scope of the *Privacy Act,* sought by the Privacy Commissioner, to include Minister's offices and the Prime Minister's office.

There is a practical concern that Ministers both head their respective departments and continue to represent their constituents and legislate on behalf of those constituents. The scope needs to ensure differential treatment of the two kinds of personal information.

16. Limit exemptions to access to personal information requests under the Privacy Act

This recommendation from the Privacy Commissioner is a rare example of conflicting positions from the two Commissioners appointed to oversee the information rights of Canadians. The Information Commissioner has recommended that the exemption for personal information should allow disclosure of personal information where there would be no unjustified invasion of privacy. The Privacy Commissioner is recommending no change to the current provision.

We understand that this recommendation relates to the proposal from the Information Commissioner's 2015 report, *Striking the Right Balance for Transparency*.[16] Her recommendation relates to section 19 of the *Access to Information Act*, the exemption from access to information for personal information. She points out that section 19 was invoked 20,701 times in 2013-2014. The Information Commissioner correctly points out that "Almost all provincial and territorial access laws contain an exception to the personal information exemption where the disclosure would not constitute an "unjustified invasion of privacy"." [p. 50]

The CBA Section is not of one mind on this recommendation. We do recommend that Parliament consider the conflicting recommendations with a view to how effective or ineffective the status quo has been and to then determine whether the most persuasive case

16 Office of the Information Commissioner of Canada. Available online at www.oic-ci.gc.ca/telechargements-downloads/userfiles/files/eng/reports-publications/Special-reports/Modernization%20Report.pdf

has been made to leave section 19 as it has been since the *Privacy Act* was enacted or to amend it to align more closely with provincial and territorial access and privacy laws.

V. CONCLUSION

The CBA Section supports many of the 16 changes recommended by the Privacy Commissioner in his March 22, 2016 letter to the Access to Information, Privacy and Ethics Committee. The CBA believes that this package of recommendations enhances the ability of the Privacy Commissioner to promote stronger privacy protection in Canada.

The CBA Section offers to discuss these recommendations and provide any necessary clarification requested by the Committee.