THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

October 31, 2017

Via email: ETHI@parl.gc.ca

Bob Zimmer, M.P.
Access to Information, Privacy and Ethics Committee
House of Commons
Sixth Floor, 131 Queen Street
Ottawa, ON K1A 0A6

Dear Mr. Zimmer:

Re: Bill C-58, *Access to Information Act*

The Canadian Bar Association Privacy and Access Law Section, Ethics and Professional Responsibility Subcommittee and Judicial Issues Subcommittee (collectively, the CBA Sections) appreciate the opportunity to comment on Bill C-58 and the proposed amendments to the *Access to Information Act* (ATIA or the Act).

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Sections comprise lawyers with an in-depth knowledge of privacy and access law and policy, ethics and professional responsibility and judicial issues.

The CBA Sections are longstanding supporters of the need to undertake a comprehensive review of the ATIA. The ATIA, which has been in force for over three decades, no longer reflects current information and communication technologies and is out of step with access to information legislation in a number of provinces and countries. More importantly, it is not aligned with citizen expectations of an open and transparent government. The CBA Sections applaud efforts to modernize the ATIA, however, the time limited review by the House of Commons Committee is inadequate to effectively assess the full implications of the bill and strengthen access to information laws. A more inclusive, transparent and extensive consultation process is needed.

In commenting, the CBA Sections incorporate by reference our relevant past submissions.[1]

Purpose of the Act

The CBA Sections support the proposed revised purpose of the ATIA in section 2 of Bill C-58, and believe it reflects the importance of access to information laws. The Supreme Court of Canada has characterized access to information legislation as quasi-constitutional in nature. In *Ontario (Public*

[1] Canadian Bar Association, *Parliamentary Review of PIPEDA* (March 2017), available online; Canadian Bar Association, *Privacy Act Amendments* (September 2016), available online [September 2016 Submission]; Canadian Bar Association, *Bill C-59, Retroactive Amendments to ATIA* (January 2016), available online; Canadian Bar Association, *Modernization of the Access to Information Act* (January 2013) [January 2013 Submission], available online; and Canadian Bar Association, *Access to Information Act Reform* (May 2009), available online.

Safety and Security) v. Criminal Lawyers' Association, the Court stated that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society."[2]

Mechanics of Access

Section 6 of Bill C-58 would limit citizens' access rights and undermine government transparency. In particular, the CBA Sections oppose the proposed requirement that the three enumerated kinds of information (specific subject matter, type of record and period of the request) constitute a threshold to obtain access. This could limit or frustrate applicants. Imposing these strict requirements in every case may have the effect of undermining the revised purpose of ATIA. Similar legislation in some provinces, like Alberta, includes a duty to assist applicants, which mandates cooperation between applicants and government institutions to support expeditious processing of requests.[3]

The CBA Sections recommend narrowing the scope of discretion in proposed subsection 6.1(1), which permits the head of a government institution to decline to act on a request for access for various reasons. Paragraph 6.1(1)(b) permits a denial of access if the person "may access the record by other means" which is excessively broad and could easily be abused. Paragraph 6(1)(c), which does not define "large number of records", is also open to abuse. Given that a time limit extension is already available under the ATIA, the CBA Sections oppose creating a new, additional ground to refuse access. Paragraph 6.1(1)(d), which permits a refusal because it is vexatious or made in bad faith, is inconsistent with the approach in some provinces. For example, in British Columbia and Alberta, this requires an application to the Information or Privacy Commissioner.[4]

Fees

The CBA Sections do not support the revision to subsection 11(1) of the ATIA proposed in subsection 7(1) of Bill C-58. The administrative cost of collecting and processing an application fee is likely to far exceed the income generated by an application fee. We question why the interim decision of the Treasury Board Secretariat to not impose an application fee has been reversed by Bill C-58. Nevertheless, the CBA Sections support the proposed fee waiver in subsection 11(6) of the ATIA (subsection 7(4) of Bill C-58). We encourage including fee waiver criteria as in some provincial freedom of information legislation, for example, subsection 75(5) of BC's *Freedom of Information and Protection of Privacy Act*. A robust access to information scheme should include criteria so that access requests of critical importance to the values underlying the legislation are not obstructed.[5] Examples of criteria include where applicants cannot afford payment, where it would be fair to waive the fees, and where the request relates to a matter of public interest.

Discretion to Refuse/Cease to Investigate

The CBA Sections support the addition of paragraph 30(4)(a) to the ATIA (subsection 13(3) of Bill C-58), which authorizes the Information Commissioner to refuse to investigate or cease to investigate a complaint that the Commissioner believes to be trivial, frivolous or vexatious or made in bad faith. The complaint investigation backlog will only be exacerbated without a mechanism to deal expeditiously with complaints that are trivial, frivolous or vexatious or made in bad faith.[6] This

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2 2010 SCC 23 at para 1.

3 See section 10 of Alberta's *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25.

4 See s. 43 of BC's *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, and s. 55(1)(b) of Alberta's *Freedom of Information and Protection of Privacy Act*.

5 See January 2013 Submission, *supra* note 1.

6 See January 2013 Submission, *supra* note 1.

amendment would parallel the approach in BC and Quebec, and mirror the Privacy Commissioner's power under sections 12 and 12.1 of the *Personal Information Protection and Electronic Documents Act* (PIPEDA). The CBA Sections recommend that, similar to PIPEDA, if the Information Commissioner exercises this discretion, the ATIA require that the requester and the government institution both be given written reasons for the decision which could then be subject to judicial review.

Order-Making Power

Section 16 of Bill C-58 adds section 36.1 to the ATIA, to grant the Information Commissioner limited order-making power. In past submissions, we have discussed various models for Commissioner oversight,[7] and have supported only limited order-making powers for the Information Commissioner for procedural matters. There is no clear consensus in the CBA Sections on whether full order-making power should be granted. However, we offer some considerations on the alternative models of access to information oversight. Nevertheless, we recommend greater clarity on the extent of the Commissioner's order-making powers under Bill C-58, as well as the right of parties to go to court (section 19 of Bill C-58, amending section 41 and adding section 44.1 to the ATIA). In general, we support a robust information rights regime, and encourage efficient and effective oversight to achieve that goal.

In considering the order making power granted to the Information Commissioner under the ATIA, it does not follow that the Privacy Commissioner be granted the same powers. Unlike the Information Commissioner, the Privacy Commissioner has a dual role – with the public sector under the *Privacy Act* and the private sector under PIPEDA – and granting order-making power for public sector purposes raises questions about the appropriateness of that power within the private sector.

1. *Ombuds Model*

The ombuds model of oversight was introduced under the ATIA. In this model, the Information Commissioner can recommend whether a government institution should provide access, but has no order-making power. If the government institution does not provide full access, the applicant can apply to the Federal Court, which undertakes a *de novo* hearing. This proceeding allows the government institution to raise new exemptions beyond those identified when access was initially denied. There are significant costs to the applicant and significant delays involved with the court application. Under this model, office credibility and persuasive analysis are the tools available to the Information Commissioner to encourage government institutions to release records when appropriate.

2. *Administrative Tribunal Model*

The administrative tribunal model was first introduced under Ontario's *Freedom of Information and Protection of Privacy Act.* This model allows the Information Commissioner to hold an inquiry, take evidence and then issue an order. In several provinces that have adopted this model, the order can be entered with the superior court and enforced like any other court order. There are usually statutory deadlines for the Commissioner to undertake and conclude the inquiry. There is no right of appeal – the parties' recourse is limited to a judicial review application. The scope of judicial review is narrower than a *de novo* proceeding, and is focused on whether a significant error was made by the Commissioner's office. There is generally no opportunity to raise new exemptions.

The administrative tribunal model has significant cost implications, including reorganization of an ombuds model office. Given the need for additional formality and process considerations, a clear

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7 See September 2016 Submission and January 2013 Submission, *supra* note 1.

delineation between staff responding to complaints and staff acting as adjudicators is necessary to ensure administrative fairness for all parties in a formal inquiry. Sufficient resources are needed to ensure that inquiries are concluded expeditiously and orders are issued within statutory time limits. With judicial review applications, unlike ombuds models, significant costs are incurred by the administrative tribunal commissioner. Many commissioners with order-making powers publish annual reports that identify the number of requests for review received, the number that settle in mediation and the number that proceed to inquiry. The vast majority of requests for review settle in mediation.

3. Modified Ombuds Model

Newfoundland and Labrador's *Access to Information and Protection of Privacy Act, 2015* has a type of modified ombuds model. Under this model, the Information and Privacy Commissioner is empowered to issue recommendations. The public body in question can apply to the superior court to overturn the recommendations if it opposes it. However, if it fails to do so in the appropriate time, the recommendations become an order which can be enforced like a court order. There has not been sufficient experience with this modified model to assess its effectiveness.

4. De Novo Proceeding

The CBA Sections have concerns with the *de novo* proceeding in the proposed section 44.1 of ATIA (section 19 of Bill C-58). A *de novo* proceeding would allow new evidence and arguments to be introduced before the Federal Court, with the possibility of obstructing access rights. We suggest that to the extent that order making power is to be granted to the Information Commissioner, judicial review of an issued order is more appropriate.

Solicitor-Client Privilege and Professional Secrecy

Solicitor-client privilege is fundamental to the fair and proper administration of justice in Canada. It is a quasi-constitutional right afforded equally to individuals and entities, including government institutions and private organizations. "Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive…. It is therefore in the public interest to protect solicitor-client privilege."[8]

The Supreme Court of Canada has stated that solicitor-client privilege can only be set aside by legislation that is clear, explicit and unequivocal, where the need to do so is absolutely necessary, and where there is minimal impairment to the privilege.[9] The CBA Sections do not believe the amendments proposed in section 15 of Bill C-58 to section 36(2) of the ATIA meet this constitutional standard. The need for the amendments has not been established. In fact, the Information Commissioner's 2014-15 report on the federal access to information regime notes that only 3.07% of exemptions related to section 23 of the ATIA (solicitor-client privilege).[10]

The CBA Sections agree that there should be clear guidance for heads of institutions who claim the solicitor-client privilege exemption, accompanied by robust internal procedures. Reviewing existing practices should be a first point of departure to address any perceived problems with the section 23 ATIA exemption.

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8 *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 SCR 555 at para. 34, 2016 SCC 53.

9 *Alberta (Information and Privacy Commissioner) v. University of Calgary,* [2016] 2 SCR 555, 2016 SCC 53; *Goodis v. Ontario (Ministry of Correctional Services),* [2006] 2 SCR 32, 2006 SCC 31*; Canada (Attorney General) v. Chambre des notaires du Québec,* [2016] 1 SCR 336, 2016 SCC 20.

10 http://ow.ly/XDAG30gfshI

Parties to litigation are required to disclose every relevant document in their possession or under their control, whether or not the privilege is claimed. However, "disclosing the existence of privileged documents is different from producing them."[11] Disclosure is made by producing a list of documents over which a claim of the privilege is made, and the burden of demonstrating that the documents are privileged is on the person claiming it. One cannot establish privilege merely by asserting it.[12] The rules about how much detail to disclose differ across jurisdictions. Generally, the privilege is claimed by providing an affidavit of documents, identifying the date, nature of the document, author and recipient. Courts do not routinely order production of privileged documents in order to assess privilege claims, and will review them only where absolutely necessary.[13]

Similarly, heads of institutions should provide specifics in support of their section 23 ATIA exemption claims. Several provincial Information Commissioners have developed protocols to guide governments when claiming solicitor-client privilege. Typically, these require disclosure of documents with appropriate detail to support the claim of privilege, but not production of the documents themselves. This may be a useful model for the federal Commissioner.

The CBA Sections do not support giving the Information Commissioner the power to compel the production of privileged information or to review privileged documents to assess the validity of the claim.

If the Commissioner believes an improper claim has been made, the ATIA authorizes review by the Federal Court. The CBA Sections support this approach. If the Commissioner is concerned that there is systemic abuse of any exemption under the ATIA, including solicitor-client privilege, there are other avenues available to the Commissioner to address those concerns, including reports to Parliament. Lawyers who encourage clients to misuse claims of privilege are subject to disciplinary action by law societies, and the ATIA itself provides serious penalties for any person who obstructs the Commissioner in the performance of her duties.

Bill C-58 proposes to amend section 23 of the ATIA to include professional secrecy and litigation privilege. This updates the ATIA to reflect the current state of the law, and the CBA Sections recommend that PIPEDA be similarly amended.

Proactive Publication of Information

Section 35 of Bill C-58 would create Part 2 of the ATIA, which would impose a system of proactive publication of information or materials related to the Senate, the House of Commons, parliamentary entities, ministers' offices, government institutions and institutions that support superior courts. The CBA Sections believe that a proactive disclosure framework must strike a careful balance to avoid being overly prescriptive or overly permissive. Releasing records through proactive disclosure is a significant tool to implement the principles underlying access to information laws, by reducing wait times and making it easier for citizens to scrutinize government behaviour. The approach in Bill C-58 is similar to other provinces and, in our view, is a significant part of modernization of the ATIA. However, designating specific categories of records that must be published runs the risk of eliminating or overlooking categories of records that should be proactively disclosed. It also creates a concern that government will determine what the public is able to see rather than responding to public requests for information. We suggest (as we have done

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11 Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014), at 323.

12 *Intact Insurance Company v. 1367229 Ontario Inc*., 2012 ONSC 5256 at para. 22, Dodek, at 323.

13 Katrina M. Haymond and Terri Susan Zurbrigg, "Solicitor-Client Privilege in the Aftermath of Blood Tribe: The "Compelling" Question of Ordering Production of Privileged Records by Privacy Commissioners and Administrative Decision-Makers" (http://ow.ly/IEsK30gb8Kj), (Paper delivered at 12th Annual National Administrative Law and Labour & Employment Law Conference, November 25-26, 2011).

in the past)[14] that the federal government also adopt a policy on proactive disclosure as a means of being more transparent and accountable, while also saving significant resources. This policy could extend beyond what is in the statute.

The CBA Sections generally support proactive publication practices as they apply to parliamentary entities and government institutions. However, we have grave concerns with the effect of proactive publication on judicial independence.

Judicial Independence and Proactive Publication

The courts and federally appointed judges fill a unique role under the Canadian Constitution. They serve as the arbiters on issues that arise between individuals and the state and are the protectors of the rights and liberties of individuals as against state intrusion, whether by legislative action or the application of criminal law. This balance ensures maintenance of the rule of law, a fundamental pillar of democracy, and one which Canada has championed at home and throughout the world.[15]

An independent judiciary is a key aspect of the rule of law. As put by Justice Canada:

> Judicial independence is a cornerstone of the Canadian judicial system. That is why, under the Constitution, the judiciary is separate and independent of the other two branches of Government, the Executive and the Legislature. Judicial independence guarantees that judges will be able to make decisions free of influence and based solely on fact and law.[16]

However, the foundation of judicial independence can be easily eroded by inattention, lack of understanding, or as an unintended consequence.

Section 38 of Bill C-58 and the proposed Sections 90.01 to 90.25 of the Act have the unintended consequence of eroding judicial independence and ought not to be passed without further review and considerable amendment.

One of the three recognized components of judicial independence is administrative independence.[17]

Proposed sections 90.01 to 90.25 of the ATIA result in an unnecessary intrusion into judicial independence in circumstances where there are already adequate means to strike an appropriate balance between access to information and securing the independence of the courts.

The specifics of those concerns may be briefly described as follows:

- Federal judges should not be equated with members of the public service or elected officials, because of the unique and distinct constitutional role of the courts.
- The overall objectives of transparency may be achieved by public and periodic reporting by each court as a whole (including reporting all applicable travel policies and budgets), without compromising independence and without the other serious and unintended consequences described below. Bill C-58 undermines independence by placing the decision-making authority about exemptions from disclosure in the hands of the registrar or

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14 See January 2013 Submission, *supra* note 1.

15 *Why is Judicial Independence Important to You?*, Canadian Judicial Council, May, 2016.

16 Justice Canada, Canada's System of Justice, (http://ow.ly/diZS30gfrJI) (referenced October 23, 2017).

17 *Judicial Independence in Canada*, a paper submitted to the World Conference on Constitutional Justice by Justice Ian Binnie in the Supreme Court of Canada, Rio de Janeiro, 2011; *Maintaining a Strong Judiciary: The View from Canada*, a presentation by Chief Justice John D. Richard of the Federal Court of Canada to the Fifth Worldwide Common Law Judiciary Conference, Sydney, Australia 2015.

equivalent government official. To preserve judicial independence, any role should be filled by the Chief Justice or Chief Judge of each court, or his or her designate.

- Adequate protections against misuse of allowances are already built into the court administrative systems. In cases of serious misuse or misconduct, matters can be (and have been) referred to the Canadian Judicial Council for investigation and possible disciplinary action.
- Publication of certain details can compromise security and safety, especially for judges who often travel on circuit, like the Federal Court and the Tax Court. These courts deal with highly contentious matters and a variety of litigants. Public disclosure of itineraries and accommodations used by judges of these courts would make it difficult to ensure security.
- Although federally appointed judges of the Superior Courts of the provinces and territories are remunerated by the Government of Canada, court administrative services are provided and funded by the provincial and territorial governments. Budgets for court administrative services are already stretched. It is unlikely that the federal, provincial or territorial governments would increase administrative budgets to provide additional resources that would facilitate this reporting, resulting in further strains on access to justice in Canada.
- Public outreach is an important role of the courts and members of the judiciary in a modern justice system. Inappropriate characterizations of judicial travel and the use of travel allowances can have a chilling effect on the participation by the courts and their members in a variety of conferences and outreach opportunities.

Statutory Review

Proposed section 93 of the ATIA requires a Ministerial review of the ATIA within one year after proclamation, and every five years thereafter. The CBA Sections support a mandatory five-year review of the Act. Five years is an appropriate time to review the statute. However, we have concerns with some other elements of the proposed review requirement. A Ministerial review is inappropriate for a law that is quasi-constitutional in nature. Ministerial reviews have been criticized for being too narrowly focused, and we believe they would lack the genuine rigour warranted by the importance of information rights. Instead, we recommend review by a Parliamentary Committee, preceded by broad-based public consultation.

We understand that the requirement for a one-year review after proclamation is intended to entrench a second phase of the government's review of the ATIA. We suggest that this objective be clarified in Bill C-58. Otherwise, a typical statutory review one year after proclamation is too early to come to any meaningful conclusion on the impacts of the recent legislative changes.

Administrative Efficiency

Proposed section 96 of the ATIA authorizes government institutions to provide services to other government institutions related to requests for access to records. The CBA Sections appreciate that this approach allows local expertise to be developed and may increase the expediency of access requests. We recommend exercising caution to ensure proper protection of confidential records and to be mindful of the risk of a loss of accountability if institutions and individuals responsible for access requests are too far removed from government institutions. We take the same position on the proposed changes to the *Privacy Act*.

Retroactive Amendments

Bill C-58 proposes granting the Governor-in-Council power to validate amendments to Schedule I of the Act retroactively. While we believe this proposed amendment is intended to address only administrative issues, such as frequent changes to names of government departments, we have opposed retroactive changes and suggest exercising caution due to the risk of setting a trend and expanding retroactive amendments beyond administrative changes. We take the same position on the proposed changes to the *Privacy Act*.

Privacy Act Amendments

The CBA Sections support the new exception to the definition of "personal information" under the *Privacy Act*, as we interpret the rationale as ensuring ministerial staff are subject to conflict rules.

Omissions in Bill C-58

While the ATIA may not be the appropriate legislation, the CBA Sections recommend that the government consider the need for a new duty to document. The duty to document decisions of government is important to an accountable and transparent government and could prevent the avoidance of disclosure through a lack of appropriate record keeping. Finally, the government may wish to include in Bill C-58 the explicit authority for the Commissioner to publish reports of findings when doing so is in the public interest.

Conclusion

The CBA Sections have long been strong supporters of updating and improving access to information laws. While we encourage more extensive consultation on this important statute, we do support the government moving forward with Bill C-58 with the changes we recommend above. We appreciate the opportunity to provide our initial comments on Bill C-58 and would be happy to explain our concerns in further detail.

Yours truly,

(original letter signed by Gillian Carter for Suzanne Morin, Darcia Senft and John Stefaniuk)

Suzanne Morin
Chair, CBA Privacy and Access Law Section

Darcia Senft
Chair, CBA Ethics and Professional Responsibility Subcommittee

John Stefaniuk
Chair, CBA Judicial Issues Subcommittee