Access to Information Act Reform

NATIONAL PRIVACY AND ACCESS TO INFORMATION LAW SECTION
CANADIAN BAR ASSOCIATION

May 2009

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

PREFACE

The Canadian Bar Association is a national association representing 38,000 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 National Privacy and Access to Information Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Privacy and Access to Information Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association National Privacy and Access to Information Law Section (CBA Section) is pleased to contribute to the Standing Committee on Access to Information, Privacy and Ethics study on reform of the *Access to Information Act* (ATIA).

Canadian courts have characterized this important piece of legislation as being "quasi-constitutional"[1]. Access to information legislation is a critical tool for democracies, as it empowers citizens and enhances government transparency and accountability. This significant role has been recognized across Canada and internationally. For example, just after his inauguration, U.S. President Barack Obama said,[2]

> A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Standing Committee has framed its review of the Act around twelve recommendations from the Information Commissioner of Canada (Commissioner). The CBA Section comments on those recommendations, and raises some additional points for the Committee's consideration.

Though not in the Commissioner's recommendations currently under review, the CBA Section has a strong interest in any discussions related to government records and solicitor-

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1 See, for example, Canada (Attorney General) v. Canada (Information Commissioner) (T.D.), 2002 FCT 128 (CanLII), Canada (Attorney General) v. Canada (Information Commissioner), 2007 FC 1024 (CanLII), or Canada (Attorney General) v. Canada (Information Commissioner), 2004 FC 431 (CanLII).

2 http://www.whitehouse.gov/the_press_office/FreedomofInformationAct

client privilege. Solicitor-client privilege forms a critical part of the foundation of the Canadian justice system. The CBA assiduously defends the principles of this privilege. Any proposed changes to the ATIA that could have an impact on this privilege should only be undertaken very carefully after close scrutiny and in consultation with the CBA.

II. COORDINATION OF ACCESS TO INFORMATION REQUESTS SYSTEM

In May 2008, the Privy Council Office announced that access to information requests would no longer be entered into the Coordination of Access to Information Requests System (CAIRS), a centralized tracking system. CAIRS provided a central repository of information on all current and past requests and an opportunity for enhanced proactive disclosure under the ATIA. While designed for internal use in government, its contents were requested under the Act and the resulting public database was then extensively used by academics, journalists and researchers.

The CBA Section believes that the government should reinstate or even expand the CAIRS system. There is a compelling public interest in knowing how the ATIA is being used and whether it is effective in meeting the needs of the public. In addition, it facilitates the collection of statistical information on responses to requests and allows for coordinated responses to similar or overlapping requests for access.

III. ISSUES IDENTIFIED BY INFORMATION COMMISSIONER OF CANADA

A. Parliament to review the Access to Information Act every five years (Recommendation 1)

Canada's ATIA became law in 1983. Since then, there have been significant transformations within government institutions. Records created on memo pads and typewriters and then stored in filing cabinets are now mainly created, stored and managed electronically. There is every reason to believe that this transformation will continue.

As the ATIA is the most important vehicle for citizen access to government records, Parliament has an ongoing responsibility to ensure the legislation is serving the country as

efficiently as possible. In our view, this requires regular review of the law. If the review finds the ATIA is keeping pace with changes in government and society, no changes will be required. It is appropriate to consider the question at least every five years.

B. All persons have a right to request records (Recommendation 2)

The ATIA currently limits access to corporations and individuals present in Canada[3]. However, nothing stops corporations and individuals not present in Canada from using third parties present in Canada to make access requests. The CBA Section supports the Commissioner's recommendation to extend the right to make access requests under section 4(1) of the ATIA to all persons.

C. Information Commissioner's order-making power for administrative matters (Recommendation 3)

Currently, the Commissioner has only recommendation powers for all matters including administrative matters such as those concerning extensions of time or fees. The CBA Section agrees that the Commissioner should have enhanced powers to better address administrative issues. This would improve the operation of the ATIA, provide an incentive to greater efficiency for government departments, and benefit requesters.

There are implications to providing order-making powers to the Commissioner. If those powers are granted, recourse to the courts, either by appeal or judicial review, should also be addressed. Under the ATIA, the Federal Court holds *de novo* hearings in respect of the Commissioner's recommendations, but that would be inappropriate for a binding order.

At present, only the requester or a third party may have recourse to the Federal Court. If order-making powers are granted, it would be important that all parties, including the government institution and any affected third parties, have the right to seek review in the Federal Court. Procedures should be set out in the Act so that hearings can be heard in a summary manner and the Court given a specific mandate to seal evidence and hear

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[3] Extension Order No. 1, SOR/89-207.

submissions *in camera* to protect information from inappropriate disclosure during the court proceeding.

D. Information Commissioner's discretion to investigate complaints (Recommendation 4)

The CBA Section supports the recommendation to allow the Commissioner discretion to decline to investigate a complaint or to discontinue an investigation under appropriate circumstances. While most complaints deserve some level of investigation, some complaints are inevitably filed for frivolous or vexatious reasons. Complaint investigation backlog would only be exacerbated if the Commissioner cannot deal expeditiously with complaints that clearly lack merit, are or become moot (e.g. a complaint about a missed time limit where the government institution subsequently granted access to the applicant), or relate to issues that have clearly been decided in previous cases. Such discretion is an important tool for the Commissioner to efficiently manage the complaint process.

We suggest that a provision like section 13(2) of the *Personal Information Protection and Electronic Documents Act* (PIPEDA)[4] should be added to the ATIA to allow the Commissioner discretion not to issue an investigation report if satisfied that one or more of the following circumstances exists:

a) the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada other than the ATIA, or the laws of a province;

b) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was filed is such that a report would not serve a useful purpose; or

c) the complaint is trivial, frivolous or vexatious or is made in bad faith.

Where the Commissioner exercises discretion not to issue a report on a particular complaint, the CBA Section recommends that the ATIA, like PIPEDA, require that both the requestor and the government institution be provided with written reasons for that decision.

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[4] Section 13(2) outlines circumstances where the federal Privacy Commissioner is not required to prepare a report under PIPEDA.

E. Public education and research mandate for the Information Commissioner (Recommendation 5)

The ATIA is one of the central tools for citizen engagement and understanding of the operations of the federal government. As such, public education about the Act is important. While many individuals and organizations have diverse interests in access to information issues, as the only public body completely dedicated to providing access to government information, the Commissioner is the obvious choice to have primary responsibility for education on access to information issues at the federal level. The CBA Section believes that the Commissioner's authority in the area of public education should be clarified and enshrined in the legislation.

F. Advisory mandate for the Information Commissioner on legislative initiatives (Recommendation 6)

Many legislative and policy initiatives have an impact on access to information but the Commissioner does not at present have a specific mandate to comment on these initiatives. The Commissioner should have this role when initiatives have potential to influence the public's right to access to information. The CBA Section supports a legislative amendment, or at a minimum, a Treasury Board policy statement, to this effect.

G. Application to administrative records of Parliament and the courts (Recommendation 7)

The Commissioner recommends extending the purview of the ATIA to cover "administrative records" of the Senate, House of Commons, Library of Parliament and the judicial branch of government "subject to provisions protecting Parliamentary and judicial privileges". The Commissioner notes that other jurisdictions have provided exclusions for records in court files and judicial (and quasi-judicial) records.

More study is required before proceeding with this recommendation. The initiative could have a negative impact on Parliamentary and court processes. When requests are made, records must be gathered and analyzed. Even if excluded, sensitive and privileged records held by Parliament and the courts could be caught up in the access to information process.

We suggest other options should be explored to address the openness of administrative records of these entities. Government should consider a policy on proactive disclosure concerning the financial expenditures by the Senate, House of Commons, Library of Parliament and judicial branch in the course of administrative functions. A comparable Proactive Disclosure policy was issued in 2006 by Treasury Board to require government-wide publication of travel and hospitality expenses. This extends to Courts Administration Service and the Supreme Court of Canada. The advantage of this approach is that access requests are unnecessary since ongoing publication provides full public disclosure.

H. Cabinet confidences (Recommendation 8)

The Commissioner recommends two revisions to the ATIA in respect of Cabinet records: that Cabinet records be subject to a discretionary exemption; and, that decisions about Cabinet records be independently reviewed. The CBA Section agrees that the current treatment of Cabinet records under the ATIA is unsatisfactory, but disagrees as to how such records should be treated.

Currently, the ATIA does not apply to "confidences of the Queen's Privy Council for Canada" under section 69. This is an exclusion, rather than an exemption, so such records are not governed by the ATIA. Instead of a discretionary exemption, we believe it would be preferable to provide a mandatory exemption under the ATIA for specified types of Cabinet records. Making the exemption mandatory would reflect its importance and assist in ensuring that Cabinet confidences remain confidential. Cabinet discussions must be frank and open in a Parliamentary democracy, to uphold the principle of collective responsibility for government decisions. A discretionary exemption for Cabinet records could undermine this principle, particularly where disclosure may be made by successive governments.

However, confidentiality must be balanced with openness. Cabinet records subject to exemption should be narrowly framed and guided by the types of records in the existing list of excluded Cabinet records in subsection 69(3) of the ATIA, and case law to date. There should also be exceptions to the exemption, which could be framed as in the current subsection 69(3): the exemption should not apply if the records are publicly available, if four years have passed since the decision was made, or if the records are over 20 years old. In

addition, these records, like others subject to exemption, should be reviewed by the Information Commissioner in the context of a complaint to comport with the principle of independent review.

The CBA Section suggests that Cabinet records dealing with national security or diplomatic relations should be subject to further study to determine the appropriateness of the application of the ATIA. The significance of records related to national security and diplomatic relations was emphasized by the Supreme Court of Canada in *Carey v. Ontario*[5] where the Court comprehensively reviewed the law about when a court may inspect Cabinet records and when the records may be considered privileged under public interest immunity. Prior to *Carey*, courts did not inspect these records. In deciding that Cabinet records could be inspected by a court in particular circumstances, and whether and when the records may be privileged, the Court enunciated a number of important principles. It also distinguished records that concern national defence and security and diplomatic relations, from other types of Cabinet records. In the former context, the Court stated that "it is often unwise even for members of the judiciary to be aware of their contents, and the period in which they should remain secret may be very long."[6] However, for other Cabinet records, the Court held that inspection should be made even without a party having to show a need for the document in the litigation. This approach should be considered as to whether these records should be accessible under the ATIA.

I. Approval of the Information Commissioner for extensions beyond sixty days (Recommendation 9)

Currently, the head of a government institution may extend the time limits established by sections 7 and 8(1) of the ATIA "for a reasonable period of time, having regard to the circumstances" where processing the request involves searching or producing a large volume of records, which would unreasonably interfere with the operations of the government institution, or where necessary consultation or third party notification cannot be completed within the initial time limit. In this regard, the ATIA is out of step with most provincial and territorial freedom of information legislation, which generally limits a public body's ability

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5 1986 CanLII 7.

6 *Ibid*, at para. 81.

to unilaterally extend a time limit to 30 days (30 business days in British Columbia). The CBA Section agrees with the Commissioner's recommendation. We recommend that the basis for extending a time limit should be further expanded by granting the Commissioner residual discretion to approve an application for an extension on grounds considered fair and reasonable (see also recommendation 12). This would enable the Commissioner to grant appropriate time extensions in extraordinary circumstances that directly affect the processing of requests, such as labour stoppages or disaster recovery.

J. Timeframes for completing administrative investigations (Recommendation 10)

The CBA Section supports time limits for the Commissioner's investigations of administrative complaints to ensure that these matters are managed expeditiously. Where the investigations cannot be completed in a reasonable time period, the delay in such complaints often results in the determination becoming moot. Time limits are required to ensure that an effective decision may be made.

K. Direct recourse to the Federal Court for access refusals (Recommendation 11)

The Commissioner recommends:

- a direct right of appeal or application for judicial review to the Federal Court immediately following an access refusal;
- that a party faced with a refusal could choose between an investigation by the Commissioner and an appeal to the Federal Court; or
- that a party would have an option to file for judicial review of a refusal if the Commissioner's investigation does not proceed in a timely manner.

Direct access to the Federal Court could provide the recipient of a refusal with more timely recourse or remedy than waiting for the Commissioner to complete an investigation.

The CBA Section does not support direct access to judicial recourse. We take this position because of the complexity of proceedings before the Federal Court, and because the majority of requesters do not have the resources to take advantage of the option. In our view, the Commissioner should be given the tools to undertake the ATIA mandate effectively.

L. Time extensions for multiple and simultaneous requests from same requester (Recommendation 12)

The CBA Section supports expanding the range of circumstances that justify a government institution extending the time limit for responding to an access request in subsection 9(1) of the ATIA. The Act now permits a government institution to extend the initial 30 day time limit where the nature of a single request requires that a large volume of records be searched or produced, if doing so within 30 days would unreasonably interfere with operations. No extension may be taken, however, where an individual or group embarks on a coordinated effort to flood an institution with an unmanageable volume of otherwise simple requests. In such cases, allowing an extension of time would not undermine the overarching purpose of the ATIA, to provide the public with the right to timely access to government information.

IV. CONCLUSION

The CBA trusts that our comments will assist in improving the ATIA. The importance of principles of openness and accountability to the functioning of Canadian democracy supports serious consideration of these recommendations, even though certain resource implications are involved.