Modernization of the *Access to Information Act*

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PREFACE

The Canadian Bar Association is a national association representing 37,000 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 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 Law Section of the Canadian Bar Association.

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Modernization of the *Access to Information Act*

I. INTRODUCTION

The National Privacy and Access Law Section of the Canadian Bar Association (CBA Section) is pleased to contribute to the Information Commissioner of Canada's public consultation on Modernization of the *Access to Information Act* (ATIA).

The Supreme Court of Canada has characterized access to information legislation as "quasi-constitutional" in nature.[1] In a number of cases the Court has affirmed the following statement in *Dagg v. Canada,* which expressly recognizes the overarching importance and purpose of access to information legislation:

> The overarching purpose of access to information legislation [...] is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 Can. J. of Econ. and Pol. Sci. 479, at p. 480:
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> Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view. [...][2]

In *Ontario (Public 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".[3] Even more recently, in *Merck Frosst Canada Ltd. v. Canada (Minister of Health)* the Court stated that: "Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it

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1 *Canada (Information Commissioner) v. Canada (Minister of National Defence),* 2011 SCC 25, [2011] 2 SCR 306 at para 40.

2 *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403 at paras 61-63; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 at para 22.

3 2010 SCC 23, [2010] 1 SCR 815 at para 1.

is hoped, to strengthen democracy. 'Sunlight', as Louis Brandeis put it so well, 'is said to be the best of disinfectants'…".[4] Canadian citizens require "true and complete" information in order to challenge government action, hold government to account and control abuses of power.[5]

Access to information laws are essential tools for democracies, as they empower and inform citizens and enhance government transparency and accountability. This significant role has been recognized across Canada and internationally and demands that Canada have, in the ATIA, a modern, effective access to information law at the federal level. The CBA Section has long strongly supported updating and improving the law in this area.[6] Below we address a number of the specific questions posed in the consultation.

II. CONSULTATION QUESTIONS

OIC Question 1: To whom should the right of access to information be given? Should it be expanded to include all persons or continue to be restricted to Canadian citizens and permanent residents?

The ATIA is an anomaly in restricting access rights to Canadian citizens and permanent residents. To our knowledge, there is no similar restriction in any provincial and territorial access legislation, or in access legislation in the United States, United Kingdom, Australia or New Zealand. Perhaps more importantly, the restriction may have little practical impact given the ease with which it can be circumvented. The CBA Section pointed out in its 2009 submission to the House of Commons Committee on Access to Information, Privacy and Ethics (2009 Submission) that a foreign actor need only retain the services of a representative present in Canada to submit a request on its behalf. In addition, we question the extent to which institutions currently probe the residency of an applicant who delivers a request from a Canadian address. If the ATIA were to permit electronic delivery of requests as discussed below, we question whether and how institutions could deal with a Canadian presence requirement for requests delivered by email.

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[4] *Merck*, supra, note 2 at para 1.

[5] Rt. Hon. Pierre Elliott Trudeau, quoted by G. Baldwin, M.P. in Standing Joint Committee on Regulations and other Statutory Instruments, Minutes of Proceedings and Evidence, 30th Parl., 1st Sess. (1974–75), 22:7 as cited in T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Ottawa: Canadian Bar Association, 1979). ("...the democratic process requires the ready availability of true and complete information. In this way people can objectively evaluate the government's policies. To act otherwise is to give way to despotic secrecy" at 1).

[6] See, for example, the CBA Section's 2009 submission to the Standing Committee on Access to Information, Privacy and Ethics.

Applicants are not required to reveal to government institutions the purpose of their requests or their intended use of responsive records.[7] Furthermore the ATIA does not place any restriction on the use or subsequent disclosure of responsive records (although certain legal restrictions such as copyright law may serve to do so in some cases). Each of these factors suggests that restriction of access rights to individuals and corporations present in Canada is not driven by a concern that records should be kept out of the hands of foreign requesters.

The possibility that expanding the right of access might result in an increase in foreign-based access requests (and the subsequent resource implications) must be carefully considered. Given the ease with which the current restriction can be circumvented, however, the impact could be minimal. Foreign requesters are likely already procuring access through representatives as described above. Removing the restriction may yield new statistical information about the origin of requests (complementing statistics on the number of requests from media, businesses and individuals).

For these reasons, the CBA Section reiterates its support for extending access rights under the ATIA to applicants physically located outside Canada's borders.

OIC Question 2c: Should the Act be applicable to judicial branch of governance (courts and court administration), legislative branch of governance (Parliament) or Ministers offices (including Secretaries of State)?

In 2009, the Information Commissioner recommended 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 Information Commissioner noted that other jurisdictions have excluded records in court files and judicial (and quasi-judicial) records.

The CBA Section supports a study of the issues raised by the 2009 recommendation, including consideration of the approach in other jurisdictions (e.g. British Columbia)[8] and the potential adverse impact on Parliamentary and judicial privileges.

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[7] For example, see *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, 2003 SCC 8.

[8] Recently in British Columbia, the *Freedom of Information and Protection of Privacy Amendment Act, 2011*, [SBC 2011] chap. 17 amended s. 3 of the *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] chap. 165 (BC FIPPA) to clarify that BC FIPPA applies to court administration records, but not to "a court record, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts". "Court record" replaces the previous reference to "a record in a court file", narrowing the scope of the exclusion. Public access to court records is administered in accordance with policy issued by each Court.

In addition, other options should be explored to facilitate the disclosure of administrative records of these entities. For example, one approach is a policy requiring proactive disclosure of 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. See also our response to OIC Question 61 below.

OIC Question 3: Is the current definition of a record sufficiently broad?

The ATIA defines a "record" as "any documentary material, regardless of medium or form". This definition is capable of a broad reading and, based on our review of recent Information Commissioner Annual Reports and investigation summaries, seems to have been liberally interpreted by government institutions and the Information Commissioner alike to encompass, for example, email correspondence, information posted to internal and external websites, and information electronically stored in a database. Accordingly, the CBA Section does not perceive an issue with the breadth of the definition. If the definition is amended, the CBA Section recommends that the broad, open-ended character of the current definition be retained, to allow for the application of the ATIA to new developments in information technology.

OIC Question 4: How should access requests to institutions be made? Should they have to be in writing or could other formats including oral requests be accepted?

Currently access requests must be delivered in writing by mail and accompanied by the application fee. The CBA Section supports a review of the implications of permitting electronic delivery of access requests and, if necessary, electronic payment of fees. As set out under OIC Question 5 below, we recommend eliminating the application fee.

A primary benefit of requiring that access requests be in writing is certainty. Both applicant and recipient have a record of the request for future reference, including clarification of the request and independent review of the response. The precise wording of a request is often important, as it may be understood differently by the various participants who produce the response (access coordinators, government officials, bureaucrats, third parties, etc.).

However, for some applicants, including those with physical limitations or difficulty reading or writing English or French, the "in writing" requirement may present an unfair barrier to access. The British Columbia government recently issued a new version of the *Freedom of Information and Protection of Privacy Regulation*[9] that contemplated limited circumstances where an applicant may submit an access request orally: the applicant's ability to read or write English is limited, or a physical disability that impairs the ability to make a written request. The CBA Section views this as a positive development to facilitate access to those who may otherwise be practically excluded, while maintaining the "in writing" requirement for the vast majority of applicants.

OIC Question 5: How Should the Act require payment of fees for making an access request, processing an access request, and providing copies of responsive records.

OIC Question 7: Should criteria for waiver of fees be included in the Act?

OIC Question 8: Should fees be legislatively waived in certain circumstances, i.e. public interest, failure to respond on time, source of the request?

Under the ATIA, applicants must pay a fee of $5 when making an access request. Although this is a small sum, it creates an unnecessary barrier to access and serves no apparent purpose. The CBA Section suggests that the need for a fee and impact on access requests be assessed and, unless necessary for the administration of the ATIA, recommends that it be eliminated.

The ATIA contemplates that applicants may be required to pay fees for time spent over five hours locating records and preparing them for disclosure. The CBA Section does not take issue with this requirement but strongly supports the introduction of fee waiver criteria (contained in other access to information statutes). A robust access to information scheme should include criteria for waiving fees so that access requests of critical importance to the values underlying the legislation are not obstructed. Examples of such criteria are:

- applicant cannot afford payment;
- it would be fair to waive fees (e.g., because the government institution has not met its duties under the legislation); or
- the request relates to a matter of public interest (e.g., the environment, public health or safety).

Under Ontario's *Freedom of Information and Protection of Privacy Act*, for example, institutions are required to waive all or part of the fees if it is "fair and equitable" to do so based on legislated criteria. Given the obstacle that fees can present in many cases, institutions should have

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9 B.C. Reg. 155/2012

legislated guidance on fee waivers (particularly for what constitutes "public interest") so consistent decisions are made and can be challenged. See also the response to OIC Question 15.

OIC Question 9: Should there be consequences when institutions fail to meet their legislated duty to assist? If so, what form should those consequences take?

Subsection 4(2.1) of the ATIA provides that "[t]he head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested."

The duty to assist is a core component of effective access to information legislation and is essential for the right of access to be meaningful. The failure to assist requesters can frustrate and obstruct access to information. Significantly, the failure to assist requesters is often not transparent to the requester which heightens the importance of ensuring that institutions meet their duty. Given familiarity with their own operations and records, institutions are in the best position to help requesters target the information most important and meaningful to them and to avoid the information that is not. It is unfair to expect requesters to identify with precision the records they seek because they often do not know what records exist. Requesters, in many cases, may be members of the public who have had little or no experience with the institution involved or access to information requests.

It is imperative that institutions be required to meet their legislated duty to assist. The CBA Section supports the idea of consequences for institutions that fail to fulfill this duty, although we do not advocate for a specific consequence.

OIC Question 10: Is there a need to establish criteria to determine if a request is frivolous or vexatious? If so, what should those criteria be? Who should have the authority to determine if a request is frivolous or vexatious? What should the role of the Information Commissioner be, if any?

There are several examples of provincial access legislation (e.g. BC, Alberta, Manitoba and Ontario) with a process by which public bodies and institutions may disregard frivolous or vexatious requests.

In BC and Alberta, a public body may apply to the Information and Privacy Commissioner for permission to disregard a request for being frivolous or vexatious. The Commissioner then

considers submissions from the parties and issues a decision. This is consistent with the general order-making power accorded each of these Commissioners.

By contrast, in Manitoba and Ontario a public body or institution is entitled to make its own determination that an access request is frivolous or vexatious, and must notify the applicant of the determination, the reasons for the determination and the process for submitting a complaint about the determination.

Notwithstanding the specific approach to addressing the issue, the CBA Section supports the common underlying principle that the right of access to information should only be exercised in good faith and must not be abused. Of the four provinces highlighted above, only Ontario has legislated specific criteria that an institution is required to consider in determining whether a request is frivolous or vexatious[10]. In other provinces, the applicable test(s) are well-established based on past decisions of the Commissioners and/or the courts.

Another common element in the provincial legislation is an oversight role for the Information and Privacy Commissioner or Ombudsperson, whether or not this is accompanied by order-making power. This serves as an important "check and balance" on the exercise of discretion by public bodies and institutions. In particular, when granting public bodies and institutions some ability to disregard requests, the CBA Section sees a need to guard against finding a request or pattern of requests vexatious because processing would unreasonably interfere with the institution's operations due to under-resourced access departments. The CBA Section does not take a position on the approach to be taken to this issue under the ATIA, recognizing that it will need to be considered as part of the larger question of the appropriate role and model for the Information Commissioner.

OIC Question 12: Should institutions be entitled to extend the 30-day period and, if so, on what basis? Should changes be made to the existing provision for extending time lines?

As expressed in its 2009 submission, the CBA Section considers it necessary to allow institutions to extend the 30-day initial response period, and supports expanding the range of circumstances in subsection 9(1) of the ATIA in which an extension is justified.

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[10] See the General Regulation issued under the *Freedom of Information and Protection of Privacy Act*, RRO 1990, Reg. 460.

The nature of information creation, exchange and management has changed significantly since the ATIA came into force. Retrieving and processing records is no longer a simple matter of locating the original and producing a copy. Access requests can be far-reaching and some applicants have become savvy at parceling aspects of a large request into small bundles that, taken on their own, do not appear overly complex to process.

The ATIA currently permits a government institution to extend the initial 30 day 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 or where consultation or third party notification cannot be completed in the initial time. However, no extension is contemplated where an individual or group embarks on a coordinated effort to flood an institution with an unmanageable volume of otherwise simple requests. It may be appropriate to permit time extensions in such cases, even though each request is narrow. The implications of this amendment should be carefully considered because a requester may require urgent access for a particular narrow request but not others. Access to the most needed records could be delayed considerably if the institution can treat several narrow requests as one broad request and to apply a time extension for all.

The ATIA is out of step with most provincial and territorial access to information legislation, which generally limits a public body's ability to unilaterally extend a time limit to 30 days (30 business days in British Columbia). We recommend that the basis for extending a time limit be further expanded by granting the Information Commissioner residual discretion to approve an extension on grounds considered fair and reasonable. The Information Commissioner could then grant appropriate time extensions in extraordinary circumstances that directly affect the processing of requests, such as labour stoppages or disaster recovery. See also our response to OIC Question 45b below.

OIC Question 15: Should there be a mechanism to ensure that institutions meet the extended deadline? Administrative consequences, access to judicial review etc.?

According to the Information Commissioner's most recent Annual Report, there has been a notable decrease in the number of time extension complaints filed – a decrease of 77 per cent from 630 complaints in 2008-2009 to 147 in 2011-12. Where complaints have been filed in the past year, it would appear that the Information Commissioner's approach of requiring the named government institution to file a formal work plan with commitment dates for response may be bearing some fruit.

In past consultations by the House of Commons Committee on Access to Information, Privacy and Ethics, some stakeholders have suggested that the ability to charge fees for processing an access request should be tied to the government institution's timely processing of that request. In particular, where a government institution commits to delivering a response by a certain date, it should not be entitled to charge the applicant fees if it misses that deadline.

While this solution may initially seem appealing, the CBA Section cautions against it being adopted as the sole recourse for delay without careful consideration. From the applicant's perspective, access delayed may in fact be access denied, particularly where the delay is long. A refund or waiver of fees may not alone be an effective remedy given that the applicant is interested in obtaining access to the records.

On the other hand, in certain circumstances, events may intervene (e.g. labour stoppage, natural disaster, data or software corruption) that render a government institution incapable of meeting an extended deadline that it originally set in good faith. It may not be reasonable to require the institution to forego fees it is otherwise entitled to recover in every case, although the CBA Section suggests that the reason for delay be subject to independent review.

There are examples of provincial access legislation, including the FIPPAs in British Columbia and Alberta, which contemplate that a public body may seek prior permission of the Information Commissioner to extend the deadline for responding to an access request beyond a statutorily mandated period (usually 30 days) on "specified" (Alberta) or "reasonable" (BC) grounds. Missed deadlines are then subject to deemed refusal proceedings, which may result in a consent order or court order establishing a new, hard deadline. Adding this type of mechanism to the ATIA would need to be considered in the larger context of imbuing the Information Commissioner with either broad-based or administrative order-making powers.

OIC Question 36: Should the Act be applicable to Cabinet confidences?

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 the records are not governed by the ATIA. The CBA Section's view is that this treatment of Cabinet records under the ATIA is unsatisfactory.

The CBA Section believes 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 ensure 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, Cabinet confidentiality must be balanced with the principles underlying the ATIA. The exemption for Cabinet records 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) of ATIA: 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.

Consideration should be given to when and how claims of Cabinet confidences may be reviewed, including whether the Federal Court should have the power to rule on such claims at any point following the assertion of such claims.

OIC Question 38: Should an exception be established for information relating to public monies spend on legal services?

The question of whether legal billing information, including legal fees, is subject to solicitor-client privilege has been the subject of many judicial decisions. The Supreme Court of Canada addressed the issue in *Maranda v. Richer*[11], finding this information to be presumptively privileged unless it can be characterized as "neutral."

The provinces and territories differ in their treatment of legal billing information. In Ontario, most case law supports the opinion that information on legal fees is neutral and accessible information. [12] In British Columbia, the case law is to the same effect.[13]. In Quebec, by contrast, the case law states that legal billing information is privileged information. [14]

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[11] 2003 SCC 67 (CanLII), [2003] 3 SCR 193

[12] *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ONCA), *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769, *Ontario (Community Safety and Correctional Services) (Re)*, 2011 CanLII 63498 (ON IPC)

[13] *Board of Education of School District No. 49 (R*e), 2010 BCIPC 30

[14] *G.T. c. Commission scolaire des Phares*, 2009 QCCAI 230

The CBA Section is a strong supporter of solicitor-client privilege and would be concerned about the ramifications of a legislated exemption to solicitor-client privilege for legal billing information. Where disclosure is warranted, this issue is addressed by the courts on a case-by-case basis in accordance with the established law of privilege. In the CBA Section's view, it would be difficult to draft an exemption for legal billing information sufficiently nuanced to enable government institutions to restrict access to information about legal fees without attracting the protection of privilege.

OIC Question 39: If a government institution is the client receiving privileged legal advice, should there be circumstances under which it is encouraged or required to waive the privilege?

The CBA believes that, due to the nature of solicitor-client privilege, the institution can only be encouraged, not required, to waive the privilege. A strict time-based rule (i.e. 25 years' time waiver mandatory limit) would be inappropriate due to the long-term nature of the advice often required by an institution.[15]

OIC Question 39a: Should government institutions benefit from the same scope of legal privilege as private parties?

The CBA believes that private parties and government institutions should benefit from the same scope of legal privilege.

OIC Question 40: Should there be separate exemptions for legal advice privilege and litigation privilege so that the particularities of each one can be taken into account in the design of the exemptions?

As discussed by the Supreme Court in *Blank v. Canada (Minister of Justice)*[16], litigation privilege and solicitor-client privilege ("legal advice privilege") are driven by different policy considerations and generate different legal consequences. They are complementary and do not conflict. But, as the Court stated in *Blank*, treating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both:

> 28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

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15 See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815 in which the SCC held that the absence of a public interest override for privileged (or law enforcement related) documents is not unconstitutional, and that the privilege itself already contains a consideration of the public interest.

16 2006 SCC 39 (CanLII), [2006] 2 SCR 319; see also Adam Dodek, "Solicitor-Client Privilege in Canada - Challenges for the 21st Century", Discussion Paper for the Canadian Bar Association, February 2011, p.9

> It is crucially important to distinguish litigation privilege from solicitor-client privilege.
>
> There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

Unlike solicitor-client privilege, litigation privilege arises and operates *even in the absence of a solicitor-client relationship*, and applies to all litigants, whether or not they are represented by counsel. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless. The principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

Section 23 of ATIA covers both litigation privilege and the legal advice privilege (solicitor-client privilege). Although there could be some benefit to requiring institutions to expressly identify which privilege is being claimed in respect of a particular record, the CBA Section would be concerned about legislated exemptions that purport to codify the evolving common law in respect of both legal advice privilege and litigation privilege.

OIC Question 45b: Should the federal Information Commissioner have order-making powers?

Currently, the Information Commissioner has only recommendation powers for all matters, including administrative matters such as extensions of time or fees. The CBA Section suggests that the Information Commissioner have order-making powers to better address administrative issues (e.g. review of institutions' fee waiver decisions).

There are implications to providing order-making powers to the Information Commissioner, whether or not limited to administrative issues. For example, recourse to the courts, either by appeal or judicial review, must also be addressed. Under the ATIA, the Federal Court holds *de novo* hearings on the Information Commissioner's recommendations, but that would be inappropriate for a binding order. Also, if order-making powers are granted, all parties, including the government institution and any affected third parties, should have the right to seek review in the Federal Court. At present, only the requester or a third party may have recourse to the Federal Court.

OIC Question 47: Should the Commissioner have the discretion to not investigate a complaint? If so, in what circumstances?

The CBA Section supports the Information Commissioner having discretion to decline to investigate a complaint or to discontinue an investigation under appropriate circumstances. While most complaints deserve some level of investigation, inevitably some complaints are filed for frivolous or vexatious reasons. Complaint investigation backlog will only be exacerbated if the Information 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 decided in previous cases. Discretion is an important tool for the Information Commissioner to efficiently manage the complaint process.

We suggest that provisions like sections 12 and 12.2 of the *Personal Information Protection and Electronic Documents Act* (PIPEDA)[17] be added to the ATIA to allow the Information Commissioner discretion not to conduct or to discontinue an investigation respectively.

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[17] Subsections 12(1), (3) and (4), section 12.1 and subsections 12.2(1) and (3) of PIPEDA, as enacted by section 83, sections 84 and 85, subsection 86(1) and section 87 of S.C. 2010, c. 23, in force April 1, 2011, *see* SI/2011-22.

Where the Information Commissioner exercises discretion not to conduct or to discontinue an investigation, the CBA Section recommends that the ATIA, like PIPEDA, require that both the requester and the government institution be provided with written reasons for that decision, which could then be subject to judicial review.

OIC Question 48: Should there be a time limit to complete an investigation?

The CBA Section supports a time limit on the Information Commissioner's investigation of administrative complaints to ensure that these matters are managed expeditiously. For example, PIPEDA requires the Office of the Privacy Commissioner of Canada to issue an investigation report within a year. Where the investigation cannot be completed in a reasonable time, the delay often results in the determination becoming moot. A time limit ensures effective decision-making and meaningful access. The CBA Section does not advocate a particular consequence for failing to complete an investigation in a specified time but suggests that the issue be considered. It may be useful to refer to the Supreme Court of Canada's decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*.[18]

OIC Question 49: Should requesters be able to seek judicial review without complaining to the Commissioner? If so, in what circumstances?

The CBA Section does not support a general right of direct access to judicial recourse. We believe the Information Commissioner is best placed to make initial determinations in a timely fashion, resulting in a more efficient use of limited government resources. Many requesters do not have the skills or resources to take advantage of direct judicial recourse. In our view, the Information Commissioner should have the tools to undertake the ATIA mandate effectively.

That said, there are cases where a requester may need urgent access to information and direct access to the Federal Court could provide the recipient of a refusal with more timely recourse or remedy than waiting for the Information Commissioner to complete an investigation. The real issue is timeliness of access, not access to court *per se*.

The CBA Section supports exploring a legislated framework for fast-tracking requests at the institution level and challenging a refusal either through the Information Commissioner or

[18] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. Although the relevant portions addressing time limits focused on the ability to extend the 90-day time limit for conducting a formal Inquiry once the time limit had already expired, this decision, and the decisions of the courts below, may provide useful guidance for drafting time limit provisions.

direct access to the courts on an urgent basis. Where urgency can be shown for all or part of the records in a request, requesters should be entitled to demand that institutions process requests quickly and to obtain a timely final determination on any refusals (whether the determination is by the Information Commissioner or the Federal Court). Consideration should be given to the definition of "urgency", as well as the impact of fast-tracking on the timely processing of "non-urgent" requests. For example, section 25 of British Columbia's *Freedom of Information and Protection of Privacy Act* requires public bodies to disclose to the public or to an affected group of people, without delay and whether or not a specific request is made, information about a risk of significant harm to the environment or to health and safety, or where such disclosure is otherwise clearly in the public interest.[19]

OIC Question 57: Should the ATIA expressly grant the Commissioner a research or educational mandate?

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 ATIA is important. While many individuals and organizations have diverse interests in access to information issues, as the only public body dedicated to providing access to government information, the Information 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 Information Commissioner's authority for public education should be clarified and enshrined in the legislation. In addition, many legislative and policy initiatives have an impact on access to information but the Information Commissioner does not have a specific mandate to comment on these initiatives. The Information Commissioner should fill this role when initiatives have a potential impact on 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.

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[19] In response to a complaint by the Environmental Law Clinic at the University of Victoria on behalf of the BC Freedom of Information and Privacy Association, the BC Information and Privacy Commissioner has initiated an investigation into the allegation that public bodies in BC have routinely disregarded the s. 25 disclosure obligations. The Commissioner's investigation report is pending. See OIPC BC news release dated July 30, 2012, "Privacy Commissioner to investigate license plate recognition and disclosure of risks to health and safety", available online: www.oipc.bc.ca.

OIC Question 58: Should the ATIA have a periodic review built-in? If so, how often should review occur?

As the ATIA is the most important vehicle for citizen access to federal government records, Parliament has an ongoing responsibility to ensure the legislation is serving the public as efficiently as possible. In our view, this requires regular review of the law.

Section 75 of the ATIA mandates that the administration of the ATIA be reviewed on a permanent basis by a Parliamentary Committee. The House of Commons Committee has received numerous submissions from the Information Commissioner and other stakeholders and has issued reports to Parliament on access to information reform. While there have been some amendments, the Committee's reports have not resulted in any substantial updating of the ATIA since it became law in 1983.

By way of comparison, British Columbia's *Freedom of Information and Protection of Privacy Act* mandates, at section 80, that it shall be reviewed by a special committee of the Legislative Assembly at least once every six years. Reviews were conducted by the Special Committee to Review the *Freedom of Information and Privacy Ac*t in 1997-1999, 2003-2004 and 2009-2010 and reports were issued with numerous recommendations. Some of these recommendations were implemented, but many were not, particularly in the wake of the 2003-2004 review.

While the CBA Section supports periodic review, and believes that it is appropriate to mandate a review of the ATIA every five years, we also question the practical effect of such an amendment given the experience to date both federally and in jurisdictions such as BC.

OIC Question 61: Should proactive disclosure practices be formalized in legislation or other, non-legislated alternatives? Are publication schemes the preferred solution to encourage proactive disclosure? What level of involvement should an Information Commissioner have in the creation, approval, maintenance and review of a publication scheme?

The CBA Section supports an exploration of both legislated and non-legislated alternatives to encourage proactive disclosure practices. The federal government should consider a broad policy on proactive disclosure as a means of being more transparent and accountable, while also saving significant resources. The 2006 Treasury Board policy (updated as recently as April 1, 2012) requiring government-wide publication of travel and hospitality expenses is a good example of the successful implementation of this type of practice.

There are many options for encouraging proactive disclosure. The CBA Section supports a system, such as the now-defunct Coordination of Access to Information Requests System (CAIRS) database, as a critical tool in ensuring the ATIA functions to support accountability and transparency.

If a legislated proactive disclosure framework is necessary to achieve the desired effect, the right balance must be struck to ensure it is neither overly prescriptive nor overly permissive. An overly prescriptive proactive disclosure framework (i.e., designating specific categories of records that must be published) may not account for the different types of records produced by different government institutions. The temptation is therefore to define the categories of records subject to proactive disclosure narrowly, which runs the risk of eliminating institution-specific categories of records that should be proactively disclosed. By contrast, an overly permissive proactive disclosure framework (i.e., one that imposes a loose requirement for proactive disclosure, but leaves the categorization of records to be disclosed in the discretion of the government institution) is unlikely to yield better results than the non-legislated alternatives. We understand that the Information and Privacy Commissioner for BC will soon conduct an analysis of the effectiveness of the BC government's Open Data, Open Information initiative, which was developed, in part, in response to proactive disclosure amendments to BC's FIPPA.[20] The BC Commissioner's analysis could provide useful insight for an effective and robust federal proactive disclosure framework.

The CBA Section supports involvement by the Information Commissioner in the creation and review of a publication scheme, although the nature of the Information Commissioner's involvement will be defined by whether proactive disclosure is implemented by legislated or non-legislated means. The Information Commissioner should, at a minimum, have the ability to comment on any proposed scheme, as the Information Commissioner can offer important third party oversight and guidance on the potential functioning of any such scheme.

OIC Question 62: Should the Act include a duty to document their decision making processes? a. Should this duty include a requirement to create records following an access request?

The duty to document decisions is important to an accountable and transparent government – if records are not kept, good governance cannot be ensured. The CBA Section supports a

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[20] Address to the FIPA Information Summit by Commissioner Elizabeth Denham, September 19, 2012, available online: www.oipc.bc.ca.

system where the avoidance of disclosure through a lack of appropriate record-keeping could be prevented. In the 2006 "Restoring Accountability" Report, Justice Gomery noted, as part of his recommendations on transparency and better management:

> The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.

The CBA Section supports further consideration of the inclusion of a duty on institutions to document decision-making, but careful thought must be given to balance the substantive types of decisions that require documentation against the need for efficiency in operations.

The CBA Section supports further study of whether the duty should include a requirement to create records following an access request.

III. CONCLUSION

The CBA Section appreciates the opportunity to contribute to the Information Commissioner's consultation. The CBA Section has long been a strong supporter of updating and improving the ATIA. We look forward to the outcomes that arise from the consultation. Please contact us if you have any questions regarding this submission, or if you require any further information.