THE NEW ACCESS TO INFORMATION AND PRIVACY ACT: A CRITICAL ANNOTATION

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I. INTRODUCTION

When at long last the freedom of information and privacy legislation, Bill C-43,[1] was given Royal Assent on 7 July 1982,[2] many who had been advocating its passage reacted with mixed emotion. Initially, before serious scrutiny of the Act, there was a great sense of relief and satisfaction. However, when it finally struck home that one would have to rewrite all speeches decrying the lack of freedom of information legislation at the federal level a sense of numbness took over. One would either have to concentrate on the provincial scene — an especially gloomy picture in the Western provinces — or move to some faraway country not yet familiar with the virtues of such a law. On closer examination of the Act, however, enthusiasm rapidly turned to despair. In spite of an almost ten-year gestation period and the most agonizingly detailed analysis of the proposed legislation in the House Standing Committee of Justice and Legal Affairs, the fledgling statute is very seriously flawed. A last minute amendment to the Bill may conceivably have gutted it,[3] by exempting politically embarrassing information which has at some time been considered by Cabinet.

Nevertheless, there are many positive features to the legislation. The mere fact of the Act's passage may be beneficial. In the United States, similar legislation has produced an attitudinal change on the part of the bureaucracy as well as improved record-keeping by government. If Canadian experience mirrors the American experience with their Freedom of Information Act[4] the impact of the Access to Information Act could be quite dramatic. Several years ago a federal report recognized that "government has become perhaps the most important single institutional repository of information about our society and its

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1 Bill C-43, 32nd Parl., 1st sess., 1980.

2 An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof, S.C. 1980-81-82, c. 111 [The Act has four schedules; Schedule I is the Access to Information Act and Schedule II the Privacy Act. Hereafter these will be cited as the Access to Information Act and the Privacy Act respectively]. [Editor's note: the Act was proclaimed in force on 1 July 1983].

3 Access to Information Act, s. 69.

4 5 U.S.C. §552 (1976).

political, economic, social and environmental problems. In some areas, the government is virtually the only significant source of information."[5]

The signification of the Royal Assent on 7 July 1982 followed a long legislative process.[6] Although The Honourable John Roberts, Secretary of State at that time, had promised federal legislation in early 1979, the Bill was not introduced prior to the defeat of the Liberal government in the election held in May of that year. The Progressive Conservative government introduced its freedom of information legislation on 28 October 1979,[7] pursuant to an election promise. That Bill contained several broadly cast exceptions to the general requirement that information be disclosed. However, it did provide for clear *de novo* judicial review of all government decisions to withhold information. A somewhat more abbreviated role for the judiciary is contained in the new statute.[8]

This analysis will focus upon the Access to Information Act. However, since its companion statute, the Privacy Act, may also be useful in the practice of many lawyers, several of its key provisions will be assessed. This latter statute replaces Part IV of the Canadian Human Rights Act[9] which was proclaimed in March 1978. Lawyers concerned with such diverse fields as immigration, unemployment insurance and income tax matters[10] have clients routinely fill out a "Record Access Request Form" in order to provide a discovery mechanism *vis-à-vis* the pertinent federal agency or department.[11] The new Privacy Act extends the right of access to and correction of personal information in government files. The Act makes important modifications to the federal government's present ability to claim public interest immunity (Crown privilege) in respect of certain kinds of sensitive information before courts and tribunals: the effect of these provisions will also be analyzed below. Pending judicial consideration of the new legislation, the annotation which follows is of necessity an academic exercise in statutory interpretation. Similarly, the impact of the Information Commissioner or of judicial review cannot, of course, be assessed at this time.

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[5] J. ROBERTS, LEGISLATION IN PUBLIC ACCESS TO GOVERNMENT DOCUMENTS 3 (1977).

[6] There has also been action on freedom of information at the provincial level. Nova Scotia, New Brunswick and Newfoundland have legislation in force; Quebec's Act is partially proclaimed; Ontario and Manitoba have not yet proclaimed legislation at the time of writing.

[7] Bill C-15, 31st Parl., 1st sess., 1979.

[8] *See* text accompanying notes 195 to 203 *infra*.

[9] S.C. 1976-77, c. 33 (*as amended by* S.C. 1977-78, c. 22, s. 5; S.C. 1980-81, c. 54, subs. 56(1)).

[10] *See, e.g.*, Information Circular No. 81-8 (Revenue Canada, Taxation, 25 Sep. 1981) which explains the Department's Interpretation of this legislation.

[11] Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 62.

II. Principles and Aids in Statutory Interpretation

A. *Legislative History*

The extent to which the legislative history of Canadian statutes can be invoked by counsel and courts remains uncertain.[12] The Supreme Court of Canada has evidenced an evolving stance toward the use of commission reports in interpreting statutes.[13] The use of Hansard and standing committee reports has also been endorsed recently by the Ontario High Court.[14] Even if courts are unwilling to entertain arguments based on legislative history, it provides a wealth of excellent material to assist counsel in understanding the meaning of this complex legislation.

Bill C-15, introduced by the Progressive Conservative government, contained many provisions which were virtually identical to those in the Access to Information Act. When the Conservatives' bill was tabled, it was accompanied by a discussion paper prepared by the Privy Council Office which is very helpful. Similarly, discussion papers accompanied the release of Bill C-43; they, too, are helpful in determining the legislative intent. Although The Honourable Francis Fox, the Minister responsible for Bill C-43, made some statements during the third reading of the Bill which are of some assistance,[15] a much more useful compendium is the record of the House Standing Committee on Justice and Legal Affairs.[16] Several amendments were made in Committee; a careful analysis of the Committee Reports will elucidate some of the main compromises which were struck there.

B. *The Purpose Clause*

Both the Access to Information Act and the Privacy Act contain purpose clauses. Rather than taking the form of a mere hortatory preamble, it is significant that the purpose clause is contained in the main body of each statute. In the Access to Information Act, for example, section 2 enunciates a clear statement of the three main components of any worthwhile freedom of information statute:

1. a clear statement of the public's right of access to information in government files;

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[12] *See, e.g.*, Krauss, *Interprétation des Lois — Histoire Législative — "La Queue qui Remue le Chien"*, 58 CAN. B. REV. 756 (1980); Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. B. REV. 624 (1954).

[13] Laidlaw v. Municipality of Metropolitan Toronto, [1978] 2 S.C.R. 736, 87 D.L.R. (3d) 161. Reference *re* Anti-Inflation Act, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452.

[14] Babineau v. Babineau, 32 O.R. (2d) 545, at 548-49, 122 D.L.R. (3d) 508, at 511-13 (H.C. 1981) (Grange J.).

[15] H.C. DEB., 32nd Parl., 1st sess., at 18850 (28 Jun. 1982).

[16] MINUTES OF PROCEEDINGS AND EVIDENCE OF THE STANDING COMMITTEE OF JUSTICE AND LEGAL AFFAIRS, Issues Nos. 15-54 (32nd Parl., 1st sess., 1980-81-82). Issues Nos. 37 to 54 are the most useful as they contain a clause-by-clause review of the legislation.

2. that necessary exceptions to the right of access should be limited and specific; and
3. that decisions on disclosure . . . should be reviewed independently of government.

A purpose clause of this sort is not a common feature in Canadian legislation; even preambles are increasingly infrequent. It is suggested that the entire statute should be read in light of this clear statement of legislative intent. If any ambiguity exists, this provision, reinforced by the mandate contained in the Interpretation Act[17] for liberal construction of statutes, should mitigate in favour of disclosure.

In addition, the Access to Information Act itself proclaims that it is "not intended to limit in any way" access to information which has normally been available to date without the benefit of a freedom of information law.[18] In other words, if, for example, the C.R.T.C.[19] has a generous discovery practice available to participants in telecommunications matters, this is not to be restricted by a narrow and somewhat ironic application of the Act. Nevertheless, in a fundamental way the Act may indeed be more restrictive than prevailing policy would suggest. Access to *any* information less than twenty years old which the Cabinet has considered is not available. The Act simply does not apply to the broadly defined category of "confidences of the Queen's Privy Council for Canada".[20] One can only hope that a restrictive interpretation of these mandatory exemptions does not prevail.

Government departments and agencies were instructed by a letter from the Prime Minister, prior to the Act's proclamation, to abide by "the spirit of the legislation".[21] Very few requests for information have arrived to date since the government has not publicized its present commitment to conform to the spirit of the Act. A task force on privacy and access to information is now working within the Treasury Board and various government institutions are gearing up for proclamation. The guidelines produced by the Task Force in consultation with the Department of Justice will be an essential aid in interpreting the Act. For example, even if certain key expressions or drafting approaches can technically lead to a very restrictive access policy, if the government's own guidelines advocate a more liberal interpretation in the circumstances, then the government may be hard pressed to assert the more restrictive policy in particular cases.[22] The guidelines and interpretations of the Act prepared by each government institution will also be helpful. Likewise if a compendium of legal opinions is prepared by the Department of Justice, the interpretation of particular cases may be useful.

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[17] R.S.C. 1970, c. I-23, s. 11.

[18] Access to Information Act, subs. 2(2).

[19] Canadian Radio-television and Telecommunications Commission.

[20] Access to Information Act, s. 69.

[21] Letter from Prime Minister Trudeau to all Members of the Cabinet, 19 Sept. 1980.

[22] Perhaps it will be possible to set up an estoppel argument against a government institution in such circumstances. *See, e.g.,* McDonald, *Contradictory Government Action: Estoppel of Statutory Authorities*, 17 OSGOODE HALL L.J. 160 (1979).

III. The Scope of the Act

A. *Who Can Apply?*

Ironically, the American Freedom of Information Act[23] has become a significant source of information for Canadians. There is no restriction in the American Act based on residency or citizenship. Canadians have used this Act to learn about multinational corporations doing business in both countries, environmental information pertaining to common ecosystems and inspection reports concerning consumer products available in both countries. There is to be no reciprocity under the Canadian Access to Information Act. There was considerable debate in Committee about these provisions. The obvious result of failing to provide reciprocity is that Canadian lawyers and other agents of American and foreign individuals and corporations will benefit financially by processing their requests.

Only persons who are Canadian citizens or "permanent residents" as defined by the Immigration Act[24] have a right to access.[25] The Access to Information Act delegates to Cabinet the power to extend the right of access to other persons;[26] this was a rather weak concession exacted during Committee deliberations. Although one does not normally refer to a corporation as a Canadian citizen, it would initially appear clear from the Interpretation Act definition of the word "person" that enterprises incorporated in Canada may also use the Act. The Privacy Act restricts access to an "individual" on the same terms as provided in the Access to Information Act.[27] One might expect, therefore, that the normal rules governing the interpretation of statutes *in pari materia* would apply to grant corporations access. However, the legislative history of the Access to Information Act leads to the opposite conclusion. When presented for first reading the section explicitly referred to "a corporation incorporated by or under a law of Canada or a province";[28] this clause was deleted. One again, therefore, corporate lawyers or agents appear to be the only beneficiaries of this amendment.

B. *What Information is Available?*

In defining the right of access, three crucial terms are employed: (1) any *record*; (2) under *control*; (3) of a *government institution*.[29]

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[23] 5 U.S.C. §552 (1976).
[24] S.C. 1976-77, c. 52.
[25] Access to Information Act, subs. 4(1).
[26] Subs. 4(2).
[27] Privacy Act, subss. 12(1), (3).
[28] Bill C-43, 32nd Parl., 1st sess., 1980., cl. 4(1)(c). (1st reading).
[29] Access to Information Act, subs. 4(1).

1. *Record*

The interpretation section provides a very broad definition for this key word:

> record *includes* any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, videotape, machine readable record, and *any other documentary material*, regardless of physical form or characteristics, and any copy thereof.[30]

The form that the information requested may take would appear to pose no problem in acquiring access. Not only is computerized information available (machine readable record) but if a record does not in fact exist but can be created by the application of normal computer techniques, then it is deemed to be a record for purposes of the Act.[31] However, regulations may limit the scope of one's right to require a government to create such information. Nevertheless, computerized data will be an increasingly important subject in the Telidon Age.

If the head of the government institution in question "believes on reasonable grounds" that the information will be published by the Crown within ninety days, then it may be withheld.[32] This ninety day period may be extended "within such further period of time as may be necessary" for printing or translating purposes. Furthermore, the Act does not apply to material which is published, available for sale, library or museum material or material in the Public Archives, National Library or National Museums of Canada.[33] It is hard to understand why these records should not be available. If the material is going to be published or made available through, say, the National Library then why should it not be available within the specific time period under the legislation? Staff manuals, however, are to be available within two years of proclamation for public inspection at the offices of the government institution in question.[34] Thus this type of "secret law" will then be available and should be of particular assistance to lawyers assessing the exercise of discretion by federal officials implementing various government programmes.

In the Privacy Act one is entitled to have access to all manner of "personal information".[35] The definition of "personal information" is very lengthy; essentially one is able to see information recorded in any form, including information which does not appear relevant to the protection of personal privacy.[36] An individual will be allowed access to "the views or opinions of another individual about the individual", except in the context of peer assessments concerning grants or awards from a

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[30] Access to Information Act, s. 3 (emphasis added).
[31] Access to Information Act, subs. 4(3).
[32] Access to Information Act, s. 26.
[33] Access to Information Act, s. 68.
[34] Access to Information Act, s. 71.
[35] Subs. 12(1).
[36] Privacy Act, s. 3.

government institution, in which case the names of the persons making the assessment are excluded.[37] However, for purposes of the Access to Information Act, personal information does not include, for example, information about the classification and salary ranges of public servants or information pertaining to "any discretionary benefit of a financial nature" received by government contractors and consultants.[38] In other words, this latter kind of personal information will be available under the Access to Information Act, notwithstanding the general exemption for personal information designed to protect privacy interests.

The Privacy Act not only allows an individual to have access to personal information in government files regarding him or herself but also provides the individual with other significant rights. If personal information is used for an administrative purpose — that is, "in a decision-making process that directly affects that individual", he or she is entitled to request correction of the information where he or she believes there is an error or omission therein.[39] In addition, the individual may require that a notation be made to the file reflecting any correction requested but not made by the government institution. Finally, the individual may require notification of the correction or notation to any person or body to whom the personal information has been disclosed within two years prior to the time a correction is requested or a notation required and, where the disclosure is to a government institution, that the institution make the correction or notation in its files. The Privacy Commissioner appointed pursuant to the Act is to be notified when personal information is disclosed for a use not consistent with the purpose stated in the Index of Personal Information Banks. In addition, the government institution shall ensure that the use is included in the next statement of consistent uses set forth in the Index.[40] By allowing the individual and the Privacy Commissioner to check the accuracy and use of personal information, the legislation appears to recognize the increasing importance of personal data in federal files.

2. *Control*

A request for information under the Access to Information Act need only describe the record requested with "sufficient detail to enable the experienced employee with a reasonable effort to identify the record".[41] One need not complete a specific form; a general information request on a particular topic should suffice. However, the Act only applies to those records under the control of government institutions.[42] There is no definition provided for the word "control". Information havens may appear

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[37] Privacy Act, para. 3(*e*).
[38] Privacy Act, paras. 3(*j*)-(*l*).
[39] Subs. 12(2).
[40] Subs. 9(3).
[41] S. 6.
[42] Subs. 2(1).

such as consulting firms and universities under contract with government institutions or those government institutions not governed by the Act. Even if information were in government hands, it may not be within its control if, say, a corporation could argue that its information was provided under a confidential or trust relationship. For example, if a corporation sought a discretionary benefit and submitted documents to a government agency designating them as confidential and submitting them only on an understanding that they were to be kept confidential, it may be possible for the corporation to argue the document was not within the control of the government and must be treated as subject to a trust. It is hoped that a court will not accede to this interpretation of this key section.

Most personal information for which access is sought under the Privacy Act will be stored in personal information banks.[43] An Index of Personal Information Banks, similar to the one which currently exists under Part IV of the Canadian Human Rights Act,[44] identifies over 1500 personal information banks. The Index is now available at post offices, libraries, and government offices across Canada. However, individual banks are exempt if these consist predominantly of information pertaining to international affairs, national defence or law enforcement and investigation.[45] Twenty-two banks have been so designated.[46] However, even if information is not listed in a personal information bank, if one is able to provide "sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution" then this information is *prima facie* available as well.[47]

3. *Government Institutions*

Both Acts apply only to those government institutions listed in a Schedule to the respective Acts. Although coverage of the legislation may be extended by regulation, it is most unfortunate that agencies established in the future will not be automatically subject to the legislation. The Acts do not contemplate a reduction in coverage; the Governor in Council may only amend the Schedules "by adding thereto".[48] Although politically understandable, it is regrettable that the draftsmen did not provide a list of government institutions *not* subject to the Acts in lieu of the inclusive approach which has been adopted. The Schedules must be read with great care. In both cases, all Departments and Ministries of State are subject to the Acts. However, the list of other government institutions is not identical. In the Access to Information Act, the Canadian Forces and the

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[43] S. 10.

[44] S.C. 1976-77, c. 33.

[45] Privacy Act, s. 18.

[46] CANADIAN HUMAN RIGHTS COMMISSION, ANNUAL REPORT OF THE PRIVACY COMMISSION, at 5 (1979).

[47] Privacy Act, para. 12(1)(*b*).

[48] Access to Information Act, subs. 77(2); Privacy Act, subs. 77(2).

Seaway International Bridge Corporation Ltd. are listed: the latter Crown corporation is not found in the Privacy Act list while the Canadian Forces is included with the Department of National Defence in the list of Departments and Ministries of State. On the other hand, the following government institutions are subject to the Privacy Act and not to the Access to Information Act: Canadian Patents and Development Ltd.; Canadian Wheat Board; Export Development Corporation; National Arts Centre Corporation; the Offices of the Auditor General, Chief Electoral Officer and Commissioner of Official Languages. It is interesting that these latter Officers of Parliament are included within the ambit of privacy legislation; presumably, they would not be amenable to the rigours of freedom of information, being creatures of Parliament rather than of the Executive.

The lists of government institutions in the Schedules do not coincide with Schedules B, C and D found in the Financial Administration Act.[49] A quick perusal of the Schedules will reveal that the commercial Crown corporations such as Air Canada, Canadian National Railway and Petro-Canada are not covered. The government justified their exclusion on the basis that since these enterprises compete in the marketplace, it would be inequitable to subject them to a greater regulatory burden than their private sector competitors would face. On the other hand, it should be emphasized that the Access to Information Act gives an extremely broad protection to commercial information of those institutions which are subject to the Act.[50] It may also be noted that the American Freedom of Information Act did not see fit to grant blanket protection to state enterprises south of the border.[51]

As a result of drafting an inclusive list of other government institutions, problems of interpretation are bound to arise. For example, are the Windsor or Fraser River Harbour Commissions subject to the Act? Although they are not listed in the Schedule, may it not be argued that they are sub-units of the Department of Transport, which, of course, is listed? They are created by delegated authority under the Harbour Commissions Act,[52] a statute administered by the Minister of Transport. On the other hand, all Harbour Commissions are bodies corporate under their constituent Act.[53] While it is unlikely a court would hold that these commissions are subject to the Act, this example illustrates the unnecessary uncertainty which the drafting approach has caused.

C. *When is Access Available?*

Even after proclamation of the Access to Information Act, there will be a substantial transitional period before the legislation becomes fully

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[49] R.S.C. 1970, c. F-10.
[50] S. 20.
[51] 5 U.S.C. §552 (1976).
[52] R.S.C. 1970, c. H-1.
[53] Subs. 3(2).

operative. In the Conservatives' Bill C-15, the forerunner to the Act, the transition period was merely one year in respect of documents more than five years old.[54] Although substantial improvements were made in Committee, there is still a much longer transition period under the Access to Information Act. The relevant section is unnecessarily complicated.[55] Assume that the legislation were proclaimed in force on 1 July 1983.[55a] During the first year of operation, *i.e.*, before 30 June 1984, the government must only disclose records existing after 1 July 1980. Between 1 July 1984 and 30 June 1985 only records existing after 1 July 1978 are subject to release under the Act. Finally, after 1 July 1985 all records must be available, but even then only where compliance, in the government's opinion, would not "unreasonably interfere with the operations of the government institution".[56] It is very difficult to justify this staged implementation programme. One does not anticipate that government will be deluged with requests for older information; the confusion seems unnecessary, particularly in light of the ten-year gestation period of the legislation. Nevertheless, even prior to the proclamation and full application of the Act, requests "within the spirit"[57] of the Act may be submitted for consideration.

D. *How is Information Made Available?*

Section 5 of the Access to Information Act requires each government institution to publish certain material annually and to update it by bulletins at least twice each year. Failure to provide a comprehensive indexing system can obviously scuttle the legislation; inadequate indexes may constitute a hidden barrier to access.

The American experience in this respect does not give rise to optimism.[58] Moreover, during times of restraint, it is easy to predict that government publications of this sort will be among the first targets of budget cutbacks. The Information Commissioner is empowered to investigate complaints about these indexes and, through reports to Parliament, may influence government behaviour in this regard.[59] Although the Act provides no right to judicial review of government compliance with the indexing requirements, a *mandamus* application to the Federal Court would be possible. One could also request access under the Act to the internal indexes of the institution in question.

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[54] Bill C-15, 31st Parl., 1st sess., 1979, cl. 28.

[55] Access to Information Act, s. 27.

[55a] [Editor's note: the legislation was proclaimed in force on that date].

[56] Access to Information Act, para. 27(1)(*c*).

[57] *Supra* note 21.

[58] *See* Masanz, *An Analysis of Agency Compliance with the Indexing Requirements of the Freedom of Information Act as Amended*, 6 GOV'T PUBLICATIONS REV. 249 (1979).

[59] Access to Information Act, para. 30(1)(*e*).

There is no requirement to publish staff manuals or so-called "secret law"; the Act merely requires a description of such manuals.[60] However, inspection of these manuals will be possible within two years of proclamation.[61] There is no indication anywhere as to how extensive this description must be. For example, the most important publication requirement is contained in the provision requiring the government to publish

> a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act.[62]

Although the Information Commissioner may well attempt to persuade government that sufficiency of detail necessitates a certain fiscal commitment, this vague requirement could represent a significant barrier. Moreover, only "classes of records" need be listed, not the titles of the documents themselves. How specific must a class description be?

Finally, the Access to Information Act allows the government institution to refuse to acknowledge whether a record exists; the agency must, however, indicate what exemption would have applied if the record in fact existed.[63] There is an equivalent provision in the Privacy Act.[64] It may be valid to argue that in the case of certain investigative files and intelligence information, confirmation of the existence of a record might itself be injurious. However, it is very difficult to justify this blanket ability of the government to stonewall *all* information requests —ironically under a freedom of information statute.

A fee not exceeding twenty-five dollars may be required when the request is made.[65] The exact amount will be determined by regulation. Additional payments may be sought for reproduction costs, computer costs and for search time in excess of five hours if reasonably required. However, all fees or other such charges may be waived or refunded.[66] No criteria for the exercise of this discretion are found in the Act. It is hoped that a public interest test will evolve in the implementation of the Act.

The time limits for granting access under the Act are rather convoluted. Generally the government institution must respond to a request within thirty days of its receipt. It need not, however, grant access at that time.[67] The time may be extended for "a reasonable period" which is not defined.[68] Extensions for a period exceeding thirty days must be communicated to the Information Commissioner.[69] Access may be

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[60] Access to Information Act, para. 5(1)(*c*).
[61] Access to Information Act, s. 71.
[62] Access to Information Act, para. 5(1)(*b*).
[63] Subs. 10(2).
[64] Subs. 16(2).
[65] Access to Information Act, s. 11.
[66] Subs. 11(6).
[67] S. 7.
[68] S. 9.
[69] Subs. 9(2).

further delayed if a request for information is transferred to another government institution which has "a greater interest in the record"[70] or where the record in question may be the subject of a third party commercial privacy exemption.[71]

IV. The Exemptions: Exceptions to the Rule of Disclosure

A. *Drafting Approaches: Enshrining Secrecy*

There are two basic ways to draft exemptions in a freedom of information law. The first approach is to draft a class exemption, listing the types of classes of documents which need not be disclosed. The class of records can be defined in either permissive or mandatory language — may or shall. The second approach is to define the interests which need protection, indicating the harms or injury which unauthorized disclosure would occasion. If a class exemption is drafted, then all information coming within that class may be withheld, notwithstanding that a state interest might suffer no injury. To add insult to this no-injury approach, if the government institution "shall not" disclose the information, then even the most innocuous information *must* be withheld. The more specific the list of exempt classes, the longer and more intricately worded it becomes.

On the other hand, if an injury or harms test is used in drafting the exemptions, the appointed officials (the Information Commissioner and judges of the Federal Court) are second-guessing the Minister responsible for the government institution. If the reviewing official is less cautious than the government institution, some will accuse him or her of having no political accountability for a decision. Conversely, if the reviewing official consistently accedes to government views as to what should remain secret, the credibility of the review process may suffer.

Many of the critics appearing before the Justice and Legal Affairs Committee opposed the use of class exemptions in the Act.[72] Professor Donald Rowat has counted eleven of the fifteen classes in the Access to Information Act as pure class exemptions, in whole or in part, with no harms test. Of these, five exemptions contain mandatory class exemptions; that is, they absolutely prohibit certain types of records from being released. These mandatory class exemptions include the following: information required to be withheld by other statutes;[73] information obtained in confidence from other government or institutions thereof;[74] financial, commercial or technical information supplied to the government in confidence by third parties,[75] as well as trade secrets of a

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[70] S. 8.

[71] Ss. 20, 28.

[72] *E.g.*, JUSTICE AND LEGAL AFFAIRS, *supra* note 16, . 23, at 23A:3 (brief of the Can. Civil Liberties Ass'n, 26 Mar. 1981); Issue No. 27, at 27A:6 (brief of the Can. Environmental Law Ass'n, 8 Apr. 1981).

[73] Access to Information Act, subs. 24(1).

[74] Para. 13(1)(*a*).

[75] Para. 20(1)(*b*).

third party;[76] personal information.[77] No time limits apply; thus the information would appear to be permanently secret.[78] In addition, Cabinet memoranda[79] and discussion papers[80] do not even come within the ambit of the Act.

When the criterion for exemption is a harms test, there is very little reference to the *amount* of injury which must occur before the record can be withheld. If the anticipated harm caused by disclosure would be trivial in comparison with the potential benefits, must the record then be withheld? Several exemptions contain a harms test, but then go on to list a number of classes of information. For example, the exemptions for federal-provincial relations,[81] defence and international affairs[82] and law enforcement information[83] all combine a harms test with a class test. They empower the withholding of information "which could reasonably be expected to be injurious to [these interests]", and go on to list a number of classes of information exempted, apparently without requiring any assessment of harm.[84] It is to be hoped that the classes enumerated should not automatically be entitled to exemption. Rather, they should be treated simply as illustrations of what might reasonably be regarded as injurious to the interest at issue. As illustrations, however, they would be supportive, not conclusive, of governmental claims for exemptions. There is considerable uncertainty as to whether information listed in these classes is thereby *deemed* to be injurious or whether it is merely exemplary of what classes of information *might* be injurious.[85] This ambiguity is regrettable.

The exemptions to the rule of disclosure are much more numerous and much more broadly cast than in the American statute.[86] As will be argued below, several exemptions are unnecessary, being effectively covered by other exemptions, or else are much too restrictive. Fortunately, there are two important qualifications. First, provision is made for the disclosure of those parts of records which can reasonably be

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[76] Para. 20(1)(*a*).

[77] Subs. 19(1).

[78] This assertion is subject to the definition of "personal information" found in the Privacy Act, s. 3 which ceases to apply after someone has been deceased for 20 years. Similarly, Cabinet records more than 20 years old, are subject to the Access to Information Act, para. 69(3)(*a*). An exception to the wide Cabinet exclusion section is found in para. 69(3)(*b*), with regard to certain Cabinet discussion papers.

[79] Access to Information Act, para. 69(1)(*a*).

[80] Para. 69(1)(*b*).

[81] S. 14.

[82] S. 15.

[83] Para. 16(1)(*c*).

[84] I am indebted to the analysis of the Can. Civil Liberties Ass'n on this point. *See* JUSTICE AND LEGAL AFFAIRS, *supra* note 16, Issue No. 23, at 23A:4 (26 Mar. 1981); Issue No. 23, at 23A:4.

[85] *See, e.g.*, the testimony of Mr. S. Chumir before JUSTICE AND LEGAL AFFAIRS, *id.*, Issue No. 20, at 20:11 (representing the Can. Bar Ass'n, 19 Mar. 1981).

[86] Freedom of Information Act, 5 U.S.C. §552 (1976).

severed.[87] It should be noted that there is no provision for the severability of personal information in the Privacy Act. How this provision squares with a mandatory class exemption remains unclear. If *all* information in the class in question shall not be released, does the severability provision apply?

Second, to the extent that a more liberal access policy may exist in certain agencies, the Access to Information Act is not intended to limit in any way access to government information which is otherwise available.[88] However, Dean John McCamus raises a grim spectre in this regard:

> [I]s it the intention of [the Access to Information Act] that information which is subject to a mandatory exemption can or cannot be disclosed in circumstances other than in response to attempts to exercise rights of access under the Act? If an individual requests access to [*e.g.* third party commercial information] in a purported exercise of a right conferred by the Act, the government must deny access. It has no discretion to disclose the material on a voluntary or discretionary basis. Could the government then subsequently disclose the record in question in response to a request, perhaps from the same individual, which makes no mention of the Access to Information Act? Although it may seem obvious that the government cannot do so, this interpretation leads to certain absurdities. So, too, however, does the alternative interpretation which would permit the government to do so. . . . If we assume that the [Act] is intended to permit disclosures of information subject to mandatory exemptions in circumstances other than the exercise of access rights [non-Act situations] the following difficulties, among others, are entailed. If an individual seeking access to government information mentions the Act in his request, he must be denied access. If he astutely does not do so, access can be given. Individuals exercising rights will be denied access whereas others not doing so may subsequently be granted access. Further, third parties protesting the disclosure of commercial information in response to a request could take appeals through the judicial system and ultimately obtain an order requiring that request be denied, only to learn that the government is free to disclose the information in question to anyone other than a requester exercising access rights. The 'mandatory nature' of the exemptions would thus appear to be merely a 'sham'. Moreover, if disclosure in a 'non-Act' situation can be made, it would appear that no discernible purpose is being served by making the exemption a mandatory one.
>
> If, on the other hand, it is assumed that these exemptions are intended to be 'true' mandatory exemptions and that disclosures cannot be made in non-Act situations, anomalies such as the foregoing vanish, but are replaced by a new set of problems. The principal difficulties are that the government would be prevented from disclosing, at its own initiative, any information requested by members of the public, Opposition MPs, or the press, which it felt should be made available and further, where the exemption is not subject to a time limit, the exempt information would be sealed up forever.[89]

The use of mandatory class exemptions certainly gives rise to perverse possibilities!

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[87] Access to Information Act, s. 25.

[88] Subs. 2(2).

[89] McCamus, *Bill C-43: The Federal Canadian Proposals of 1980* in FREEDOM OF INFORMATION: CANADIAN PERSPECTIVES 266, at 280 (J. McCamus ed. 1981).

B. *Information From Other Governments*

Both Acts provide that information obtained in confidence from foreign governments, international organizations of states, provincial, municipal and regional governments, or institutions of any of these, shall not be disclosed unless the body that was the source of the information consents to the disclosure or the information was already public.[90] The term "in confidence" may invite abuse. Will even innocuous material obtained from other governments now be routinely stamped "in confidence"? Similarly, the word "institution" is not defined. One would expect that it would include provincial Crown corporations which submit documents to federal regulatory agencies. However, this remains uncertain.

C. *Federal-Provincial Affairs*

Under the terms of this exemption, the government agency may refuse to disclose information "which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs".[91] In the Access to Information Act but, interestingly, *not* in the Privacy Act, this objective harms test is modified by a list of classes of information. These classes concern federal-provincial consultations[92] and strategy or tactics adopted by the federal government.[93] As noted above,[94] the effect of this construction is uncertain.

In Bill C-15, the Conservative government's forerunner of the Access to Information Act, this exemption was much more limited. In that Bill, a record was exempt only if it contained "information the disclosure of which could reasonably be expected to affect adversely federal-provincial *negotiations*".[95] The scope of this exemption has undoubtedly been expanded by replacing the word "negotiations" with the operative word "affairs". This exemption would seem to be totally unnecessary since other exemptions pertaining to economic interests, pending negotiations and policy advice as well as the Cabinet exclusion provision would amply meet the government's concerns. More specifically, an exemption worded to protect records relating to federal-provincial affairs could potentially embrace almost every subject of government in a federal state like Canada. One hopes that the two classes listed in section 14 are exhaustive illustrations of federal concerns in this area. Areas like agriculture, transportation, environmental protection and hospital or medical insurance all involve constant federal-provincial consultation. This

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[90] Access to Information Act, s. 13; Privacy Act, s. 19.
[91] Access to Information Act, s. 14; Privacy Act, s. 20.
[92] Para. 14(*a*).
[93] Para. 14(*b*).
[94] *See* text accompanying note 84 *supra*.
[95] Bill C-15, 31st Parl., 1st sess., 1979, cl. 14 (emphasis added).

exemption, like others analyzed below, may well "swallow the rule" of openness in government.

D. *International Affairs and National Defence*

A very detailed exception is provided in both Acts for records containing information which, if disclosed, "could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada". Moreover, if such information could be injurious to the "detection, prevention or suppression of subversive or hostile activities" it may also be withheld.[96] In addition to this harms test, there is a list of nine broad classes of information which are to be exempted from disclosure at the government's discretion.[97] Once again, the import of listing these nine exempt classes of information following a harms test is uncertain.[98] Since these classes are worded so broadly, the result of holding *all* information falling within them as exempt would be absurd. It would be impossible to hold Canada's military even marginally accountable if some of this information could be routinely withheld.[99]

When coupled with the mandatory class exemption for information obtained from foreign states or international organizations, the scope of protection offered in this exemption would appear to be unnecessarily wide. Moreoever, there is no time limitation except to the extent that the Access to Information Act is modified indirectly by Public Archives practice. Even the *existence* of records in these classes need not be revealed. If intelligence were gathered illegally or its disclosure would reveal the corruption or incompetence of military personnel, it may not be disclosed however outrageously the intelligence gathering may have transgressed civil liberties. Even if such intelligence were gathered for states merely associated with Canada it makes no difference; all information in these categories is exempt. There can be little, if anything, revealed about the activities of the Security Service of the R.C.M.P. or of the Canadian Forces in Quebec during the October Crisis of 1970. A class exemption has been obtained for this type of information.[100] Assessing allegations of police harassment made by lawful dissenters will be thwarted by the very wide definition accorded to "subversive or hostile

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[96] Access to Information Act, s. 15; Privacy Act, s. 21.

[97] Access to Information Act, subs. 15(1).

[98] *See* JUSTICE AND LEGAL AFFAIRS, *supra* note 16, Issue No. 20, at 20A:27. The brief of the Can. Bar Ass'n stated: "Information falling within such [nine] classes would be exempt even in the face of the clearest demonstration that disclosure thereof would not be of the slightest harm to international affairs, defence or the suppression of subversive or hostile activites."

[99] *See, e.g.*, Access to Information Act, para. 15(1)(*b*), which exempts information pertaining to the characteristics of [all] defence equipment. *Quaere*: Would the basic specifications of the F-15 aircraft now be a state secret?

[100] Para. 15(1)(*c*).

activities".[101] Comparison of this exemption with the law and practice in the United States is disturbing indeed.[102]

E. *Law Enforcement and Investigations*

The concerns of Ontario Attorney General, The Honourable R. McMurtry, Q.C., with respect to the law enforcement exemption[103] almost occasioned the death of Bill C-43.[104] Despite the concerns which were expressed on behalf of several provinces, this exemption remains distressingly broad, covering information prepared by investigative bodies pertaining to: the detection and prevention of crime, enforcement of any law of Canada or a province and investigative plans for specific lawful investigations.[105] A harms test respecting law enforcement or the conduct of lawful investigations is included, listing three apparently off-limit classes of investigative information[106] as well as a harms test for information relating to prison security.[107] There is provision for a class exemption covering information "that could reasonably be expected to facilitate the commission of an offence", and three exempt classes are listed.[108] Finally, a mandatory class exemption is set out for R.C.M.P. information obtained in the performance of policing services for a province or municipality.[109] Undoubtedly, this law enforcement exemption covers a vast body of material.

One immediate difficulty is that there is no restriction on what type of government institution or part thereof may be classified as an investigative body. Regulations specifying investigative bodies for the purpose of paragraph 16(1)(*a*) may be enacted later by the Governor in Council.[110] Presumably, for example, the Security Service of the R.C.M.P., or a successor agency with similar power, would be exempted by regulation. However, until the regulations are promulgated, it is impossible to determine whether the routine information amassed by enforcement and compliance officers in various agencies will be totally exempt. Such officers would be enforcing any law of Canada or a province. It must be emphasized that many agencies carry out regular routine inspections and rarely, if ever, prosecute parties who do not

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[101] Subs. 15(2).

[102] C. MARWICK, LITIGATION UNDER THE AMENDED FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT 28-36 (6th ed. 1981).

[103] Access to Information Act, s. 16; Privacy Act, s. 22.

[104] Letter from the Hon. R. McMurtry to the Hon. F. Fox, 10 Jun. 1981, wherein Mr. McMurtry expressed the concerns of several provinces regarding the law enforcement exemption. For a detailed rebuttal to these concerns, *see* Rankin, Freedom of Information and the McMurtry Letter: A Response to Provincial Concerns (Can. Bar Ass'n, Ottawa, Apr. 1982).

[105] Access to Information Act, paras. 16(1) (*a*) and (*b*).

[106] Para. 16(1)(*c*).

[107] Para. 16(1)(*d*).

[108] Subs. 16(2).

[109] Subs. 16(3).

[110] Para. 77(1)(*f*).

comply with the regulations. One cannot object to information gathered in contemplation of prosecutions being withheld where a specific prosecution is contemplated. Such disclosure could be injurious to such a prosecution. On the other hand, there can be no justification for preserving secrecy for routine inspection. Even for agencies like the R.C.M.P. Security Service, the degree of protection accorded in this legislation is far greater than that granted to the F.B.I. or C.I.A. in the American legislation.[111] The scope of protection for these agencies exceeds even that recommended by the McDonald Commission.[112] It would appear that much of the information in section 16 would be exempt under the policy advice exemption discussed below in any event.

F. *Safety of Individuals*

Both Acts contain an exemption for information which if disclosed "could reasonably be expected to threaten the safety of individuals".[113] This is not a controversial provision. The Privacy Act also contains a provision for information prepared for the purpose of determining whether security clearances are to be granted.[114]

G. *Proprietary and Financial Information*

Government files contain vast quantities of information of commercial value. If the information is submitted by third parties, of course, the prospect of its unauthorized disclosure under the legislation can be very disturbing to these third parties. Also, the disclosure of certain information can seriously affect the economic interests of the country. Sections 18 and 20 provide a series of exemptions in this vital area. Proprietary information, including trade secrets belonging to the federal goverment, *may* be withheld only if it has, or is reasonably likely to have, substantial value. By contrast, a mandatory class exemption is provided for the trade secrets of a third party.[115] Even the public interest in assessing a firm's compliance with health and safety legislation cannot override this protection.[116] This sacrosanct category of trade secrets is not

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[111] C. MARWICK, *supra* note 102, at 94-103.

[112] COMMISSION OF INQUIRY CONCERNING ACTIVITIES OF THE R.C.M.P., SECURITY AND INFORMATION, FIRST REPORT 39 (McDonald J. Chairman 1979).

[113] Access to Information Act, s. 17; Privacy Act, s. 25.

[114] S. 23.

[115] Access to Information Act, para. 20(1)(*a*).

[116] Subs. 20(6) states that the government may release information under paras. 20(1)(*b*), (*c*) or (*d*), where disclosure "would be in the public interest as it relates to public health, public safety or protection of the environment" if the public interest in the disclosure clearly outweighs any financial harm to a third party. Since para. 20(1)(*a*) [*i.e.*, trade secrets of a third party] is excluded from mention in subs. 20(6), it can be concluded that the exemption for third party trade secrets is mandatory, despite a competing public health or safety need for disclosure.

defined in the Act.[117]

Canadian courts generally have accepted a very broad definition of trade secret:

> A trade secret may consist of any formula, pattern, device or *compilation of information which is used in one's business*, and which gives him an opportunity to obtain an advantage over the competitors who do not know or use it. [It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.][118]

At this time, various government institutions subject to the Access to Information Act are preparing policy for the treatment of confidential business information, including trade secrets material.[119] For trade secrets and other information owned by the Government of Canada, the broad protection provided in paragraph 18(*a*) seems unncessary. This would exempt an entire range of economic information merely by reference to its substantial value; it contains no reference at all to the anticipated *harm* or to any undue *benefit* resulting from unauthorized disclosure. Although paragraph 18(*d*) goes on to provide a harms test for other kinds of economic information, it proceeds to list six additional classes of exempt information, once again, apparently without any assessment of perceived harm.[120]

Besides trade secrets of a third party, a mandatory class exemption is provided for other kinds of financial, commercial or scientific information found in government files.[121] This protection, however, arises only if such information is confidential and "treated consistently in a confidential manner by the third party". What does this phrase add? Does it merely create a false incentive for business enterprises and government to treat inconsequential data generated by the private sector as confidential? Is the Information Commissioner or the court to determine, as a matter of fact, whether or not such treatment was provided, and, if so, was it done consistently? It appears that the standard of confidentiality is imposed by the very person who has the greatest interest in keeping the information secret, namely the third party who supplies it to the government.[122] If information is given by the private sector in order to acquire some benefit or as a compulsory filing under some government policy or programme, the corporation should not be the body to determine whether the information can be disclosed. If the

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[117] For an excellent analysis of the concept of a trade secret, *see* Vaver, *Civil Liability for Taking or Using Trade Secrets in Canada*, 5 CAN. BUS. L.J. 253 (1981).

[118] R.I. Crain Ltd. v. Ashton, [1949] O.R. 303, at 309; [1949] 2 D.L.R. 481, at 486 (H.C.) (emphasis added).

[119] *See, e.g.*, the draft ENVIRONMENTAL PROTECTION SERVICE POLICIES and GUIDELINES ON CONFIDIENTIAL BUSINESS INFORMATION (Feb. 1982).

[120] Subparas. 18(*d*)(i)-(vi).

[121] Para. 20(1)(*b*).

[122] JUSTICE AND LEGAL AFFAIRS, *supra* note 16, Issue No. 27, at 27A:7 (brief of the Can. Environmental Law Ass'n. 8 Apr. 1981).

corporation has filed information with foreign regulatory authorities, the information should be available under the Access to Information Act.

Arguments about financial losses or prejudice to a competitive position may, at times, give way to disclosure in the public interest in assessing government regulation of, for example, health and safety. Provision is made for this in subsection 20(6). Note that the information in this category must have been supplied by a third party; if otherwise confidential business information was created by the government, then presumably it cannot come within this particular class of the exemption. However, such information might well be covered by paragraph 20(1)(*d*). It is refreshing to note that among some federal regulatory agencies the notion of confidentiality *per se* is not accepted.[123] In fact, paragraph 20(1)(*b*) could safely be deleted from the Act with no apparent loss of legitimate business confidentiality.

The Access to Information Act provides third parties with the right to be informed when a government institution intends to disclose any record which might contain proprietary or financial information supplied by this third party.[124] The Act allows the third party twenty days in which to argue against disclosure[125] and this time limit may be extended. In the event of a complaint and investigation by the Information Commissioner, the third party shall be given a reasonable opportunity to make representation to the Commissioner.[126] The third party has full rights to be involved in any judicial review in which his or her proprietary or financial information is at stake.[127] This review mechanism will be considered below.[128]

H. *Product and Environmental Test Results*

Significant amendments to this provision were achieved by Opposition critics at the Committee stage.[129] In the version of the Bill at first reading,[130] subsection 20(2) would have denied access to the results of product or environmental testing if the government agency "believe[d], on reasonable grounds, that the results [were] misleading". This latter condition was removed from the section as enacted; now, upon releasing the test results, the government shall "provide the person who requested the record with a written explanation of the methods used in conducting the tests". The fact that the results may appear misleading is of no

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[123] *See, e.g.* the C.R.T.C. TELECOMMUNICATIONS RULES OF PROCEDURE, R. 19(2) and other practices outlined in JUSTICE AND LEGAL AFFAIRS, *supra* note 16, Issue No. 25, at 25A:3 (brief of the Consumers' Ass'n of Can.).

[124] Subs. 28(1).

[125] Para. 28(5)(*a*).

[126] Para. 35(2)(*c*).

[127] Ss. 43, 44.

[128] *See* text accompanying notes 207-217, *infra*.

[129] The Hon. F. Fox tabled amendments to Bill C-43 in Committee. JUSTICE AND LEGAL AFFAIRS, *supra* note 16, Issue No. 37, at 37:4 (2 Jun. 1981).

[130] Bill C-43, 32nd Parl., 1st sess., 1980-81 (first reading 17 Jul. 1980).

consequence.[131] Strangely, there is no parallel provision in section 18 specifically requiring disclosure of the results of product or environmental testing conducted by the federal government for government purposes. As a result, disclosure of test results, carried out by or on behalf of a government institution for a third party, may not be refused,[132] whereas the government's own test results belong to the government and may perhaps evade disclosure under the Act.

The results of preliminary testing conducted in order to develop methods of testing are not to be released.[133] One possible difficulty in determining the degree of disclosure under this section relates to what the term "results" might entail. For example, would raw data, such as animal research studies, upon which results are predicated, be available under this Act? In order to address this possible difficulty, American legislation, particularly in the environmental field,[134] has largely overridden any difficulty with the equivalent exemption in the Freedom of Information Act pertaining to trade secrets.[135]

I. *Personal Information*

Both Acts prohibit access to personal information except to the individual about whom the information is compiled.[136] The only exception to this basic policy occurs where the individual to whom the record relates consents to the disclosure, or where the information is publicly available.[137] Otherwise, a mandatory class exemption is provided.

The term "personal information" is defined in section 3 of the Privacy Act and provides the relevant test for both statutes. A series of detailed class tests are set out primarily focusing upon the personal records, details or opinions respecting an identifiable individual. These various classes are then subjected to certain exceptions, generally relating to the individual's involvement in government work.

The American approach is to provide a balancing test. The general rule of disclosure in the United States does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy".[138] Despite the apparent brevity of this American drafting approach, there has been

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[131] Access to Information Act, subs. 20(3).

[132] Subs. 20(2).

[133] Subs. 20(4).

[134] *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. §§2603(c)(3), 2613(b) (1976) and the Insecticide, Fungicide and Rodenticide Act, 15 U.S.C.A. §136a(c)(1)(D) (West Supp. 1979), which provide for the release of health and safety data, protecting the supplier thereof by means of a compensation scheme or exclusive use arrangements. *See generally*, McGarity and Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 HARV. L. REV. 837 (1980).

[135] 5 U.S.C. §552(6)(C)(b)(4) (1976).

[136] Access to Information Act, s. 19; Privacy Act, s. 26.

[137] Access to Information Act, subs. 19(2); Privacy Act, s. 8.

[138] Freedom of Information Act, 5 U.S.C. §552(6)(C)(b)(6) (1976).

considerable case law defining where the balance is to be struck between the public interest in disclosure and the individual's interest in privacy.[139]

Although at first blush the Canadian legislation would appear to provide no equivalent balancing test, it must be noted that personal information may be disclosed if its disclosure is in accordance with section 8 of the Privacy Act.[140] Section 8 permits the disclosure of personal information to people and institutions other than the individual concerned (*e.g.*, to investigative bodies involved in law enforcement, to the Attorney General, to one's Member of Parliament, to Indian associations researching land claims and to the Public Archives). In addition, personal information may be disclosed "to any person or body for research or statistical purposes" if the agency is satisfied that the information cannot be reasonably obtained without identification of the individual concerned *and* if the government obtains a written undertaking from the researcher that the personal information contained in the document will not be utilized so as to identify the individual concerned.[141]

Furthermore, a broadly worded provision allows the agency to disclose personal information as follows:

> for any purpose where, in the opinion of the head of the institution,
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or
> (ii) disclosure would clearly benefit the individual to whom the information relates.[142]

In other words, the Canadian freedom of information and privacy legislation provides the same type of balancing approach as its American counterpart, albeit by a very circuitous drafting route. However, the total effect of this subsection is unclear. Although the individual to whom the personal information pertains has a right to complain to the Privacy Commissioner, there is no right to seek judicial review. Moreover, it is most unlikely that the individual would be aware of a government decision to disclose this information.

On the other hand, the person seeking the disclosure of records which contain some personal information may complain to the Information Commissioner and seek judicial review of any decision to withhold personal information. A problem arises if the opinion of the head of the institution is considered by the courts to be a subjective opinion which is not to be "second-guessed" on appeal. This result would be unfortunate since the legislative history of the privacy exemption shows a clear intention to permit this sort of balancing judgment to be reviewed.[143]

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[139] The leading case is Department of the Air Force v. Rose, 425 U.S. 352, 96 S.C. 1592 (1976).

[140] Access to Information Act, para. 19(2)(*c*); Privacy Act, s. 26.

[141] Para. 8(2)(*j*).

[142] Para. 8(2)(*m*).

[143] Cl. 19(2)(*c*) was added to Bill C-43 after first reading. JUSTICE AND LEGAL AFFAIRS, *supra* note 16, Issue No. 48, at 10-22 (7 Jul. 1981).

J. *Policy Advice*

In the 1977 Green Paper, the purpose of a policy advice exemption in a freedom of information statute was described as an attempt to "preserve the fullness and frankness of advice serving the decision-making process, particularly in relation to advice to or by Ministers, deputy heads, and senior officials, to preparation of legislation, or to the conduct of parliamentary business". The Green Paper also candidly conceded that the policy advice exemption is "the most problematic exemption".[144]

The American exemption has been interpreted to cover only pre-decisional documents, created by public officials, which are clearly of a subjective or policy nature. The exemption does not warrant the withholding of factual and statistical information or documents that actually contain or explain a decision already made or policy already created.[145]

The exemption contained in the Access to Information Act allows the withholding of policy advice for a twenty-year period.[146] However, there is no exemption in the Privacy Act. An immediate problem with the Canadian exemption is that it lists classes of exempt policy advice and no harms test is provided. In light of the purposes of this exemption, it is essential that advice or recommendations be construed to deal only with pre-decisional, truly policy-oriented concerns. This intention is reinforced by the fact that consultants' reports are not covered by the exemption, nor are reasons given for administrative rulings by the agency in question.[147]

K. *Miscellaneous Exemptions*

1. *Testing and Audit Procedures*

The Access to Information Act allows the government to withhold "information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted". Disclosure may only be withheld, however, if it would "prejudice the use or results of *particular* tests or audits".[148]

2. *Solicitor-Client Privilege*

If the record requested contains information that is subject to solicitor-client privilege, it may be withheld.[149] Presumably, the scope of the

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[144] HON. J. ROBERTS, LEGISLATION ON PUBLIC ACCESS TO GOVERNMENT DOCUMENTS 11-12 (Green Paper, Jun. 1977).

[145] Freedom of Information Act, 5 U.S.C. §552(b)(5) (1976). *See* C. MARWICK, *supra* note 102, at 67-76.

[146] S. 21.

[147] Subs. 21(2).

[148] S. 22 (emphasis added).

[149] Access to Information Act, s. 23; Privacy Act, s. 27.

common law solicitor-client privilege would be applicable in interpreting this exemption.[150] Although the American Freedom of Information Act does not contain a specific exemption to this effect, the courts have interpreted one of the exemptions to include some aspects of work prepared by government lawyers.[151] Although documents prepared by a lawyer revealing the theory of his or her case or litigation strategy are not available under the American Act, the courts have made it clear that the privilege is limited to documents prepared in anticipation of particular litigation or prepared on the basis of some claim likely to lead to litigation.[152]

Bearing in mind the policy considerations upon which the solicitor-client privilege is predicated, there would appear to be no reason for routine legal opinions concerning the scope of regulations to be withheld. Only private communications in which confidential information is provided by the client to the lawyer should be included. It is hoped, therefore, that this exemption will be interpreted narrowly.

3. *Security Clearances*

A class exemption is contained in the Privacy Act prohibiting an individual from obtaining records relevant to the determination of whether security clearances should be granted.[153] This class exemption, however, is modified by a harms test which seeks to protect the identity of the sources of the personal information.

4. *Penal Information*

An individual is not allowed access, under the Privacy Act, to information collected or obtained by the Canadian Penitentiary Service, the National Parole Service or the National Parole Board if, on balance, it would be deleterious to that individual's "institutional, parole or mandatory supervision program" or would otherwise reveal information originally obtained on an express or implied promise of confidentiality.[154] This exemption accords with the policy concerns expressed by the National Parole Board and others.[155]

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[150] Solosky v. The Queen, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745 (1979).

[151] 5 U.S.C. §552(6)(C)(b)(5) (1976) exempts from disclosure: inter-agency or intra-agency memoranda or letters which would not be available by any law to a party other than an agency in litigation with the agency.

[152] Coastal States Gas Corp. v. Department of Energy, 617 F. 2d 854, at 864-66 (D.C. Cir. 1980).

[153] S. 23.

[154] S. 24.

[155] P. CARRIÈRE & S. SILVERSTONE, THE PAROLE PROCESS 105 (1976).

L. *Medical Records*

The Privacy Act also allows the government institution to withhold personal information relating to an individual's mental or physical health where the examination of the information by the individual "would be contrary to the best interests of the individual".[156] Presumably the withholding of one's medical records can be re-examined on appeal. The Honourable R. McMurtry advocated the possible release of such information to law enforcement officials in emergency situations, agreeing with the Krever Commission[157] that the information should be available on an emergency basis, even without the patient's prior consent.[158]

M. *Other Statutory Prohibitions*

A mandatory class exemption is provided in the Access to Information Act, regarding the disclosure of information which is restricted under thirty-three statutes listed in Schedule II to the Act.[159] There is no similar exemption in the Privacy Act. In addition to the statutes listed in the Schedule, four additional provisions, dealing primarily with the National Energy Program are in effect added to Schedule II by virtue of sections 6 through 9 of Bill C-43. In each case these Acts have been added to the Schedule since they have all been given Royal Assent.[160] It is regrettable that the Access to Information Act does not constitute a comprehensive code regarding the confidentiality of government records. One must still consult a host of statutory enactments to discover whether a document can or cannot be released. Future enactments must each mention specifically whether confidentiality provisions are to be made referable to the Access to Information Act. However, a parliamentary committee is obligated under the Act to report within three years of proclamation on whether and to what extent such other statutory exemptions are necessary.[161]

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[156] S. 28.

[157] REPORT OF THE ROYAL COMMISSION OF INQUIRY INTO THE CONFIDENTIALITY OF HEALTH INFORMATION, Recommendation 23, at 17 (Krever J. Chairman 1980).

[158] Letter from Hon. R. McMurtry to Hon. F. Fox, 21 Jan. 1982.

[159] S. 24.

[160] Accordingly, the following statutes should be added to Schedule II: Canadian Ownership and Control Determination Act, S.C. 1980-81-82, c. 107, s. 49 (Royal Assent 29 Jun. 1982); Energy Monitoring Act, S.C. 1980-81-82, c. 112, s. 33 (Royal Assent 7 Jul. 1982); Motor Vehicle Fuel Consumption Standards Act, S.C. 1980-81-82, c. 113, subs. 27(1) (Royal Assent 7 Jul. 1982); Petroleum Incentives Program Act, S.C. 1980-81-82, c. 107, s. ct, subs. 69(3); Privacy Act, subs. 70(3).

[161] Subs. 24(2).

N. *Cabinet Records: The Ultimate Exemption*

When Bill C-43 was given first reading, it contained among the exemptions one pertaining to Cabinet documents.[162] It was a broadly drafted, mandatory class exemption. For twenty years, records such as Cabinet memoranda and briefing papers were absolutely exempt.

When Bill C-43 was finally given Royal Assent, however, this class exemption had been replaced by a much more draconian provision in both Acts.[163] In its final form the legislation does not apply to confidences of the Cabinet. Without restricting the generality of this term, and without providing any harms test, the Acts go on to list seven categories of information to which the legislation does not even apply. In other words, none of the appeal mechanisms or other rights available apply to Cabinet information. However, this provision does not apply to Cabinet confidences more than twenty years old or to certain discussion papers.[164] In defending this last-minute change, The Honourable F. Fox expressed concern about two Canadian court decisions which have expressed a willingness to review Cabinet documents in certain limited circumstances.[165] Under the amended legislation, therefore, courts will be allowed to inspect the most sensitive national security information; however, they will be unable, for any purposes whatsoever, to look at Cabinet documents.

Critics have been quick to refer to this eleventh hour change as the "Mack truck" amendment. It is feared that to forestall an Act which would allow widespread government accountability, civil servants will begin to stamp a wide range of background and briefing documents "for Cabinet eyes only". A process of Cabinet laundering may arise for politically sensitive but otherwise harmless information. In other words, records which would have been accessible under the Act will be processed through a Cabinet briefing book or memorandum; thereafter, the Act does not even apply to such records. The Honourable W. Baker, Progressive Conservative critic for freedom of information, has made an unequivocal promise that should his party come to power in the next election, it would remove this blanket provision concerning Cabinet documents.[166]

In addition, it should be noted that both Acts contain a rare provision *requiring* a review on a permanent basis by a parliamentary committee in respect of the administration of this legislation. Within three years after its proclamation, a comprehensive review *shall* take

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[162] 32nd Parl., 1st sess., 1980-81, cl. 21 (first reading, 17 Jul. 1980).

[163] Access to Information Act, s. 69; Privacy Act, s. 70.

[164] Access to Information Act, subs. 69(3); Privacy Act, subs. 70(3).

[165] Mannix v. The Queen in Right of Alberta, 31 A.R. 169, 126 D.L.R. (3d) 155 (C.A. 1981); Gloucester Properties Ltd. v. The Queen in Right of British Columbia, 32 B.C.L.R. 61, 123 D.L.R. (3d) 33 (C.A. 1981).

[166] H.C. DEB., 32nd Parl., 1st sess., at 18856 (28 Jun. 1982).

place.[167] Therefore, if the Cabinet exception to the Act is abused, there will be ample occasion for groups to make submissions about reform.

V. The Review Process

This part will assess the provisions of the freedom of information and privacy legislation relating to the review of decisions to withhold access to government documents.

The legislation contemplates two Commissioners, a Privacy Commissioner and an Information Commissioner who, as officers of Parliament, are empowered to act as advocates when requests for information are denied. The Commissioners also have other powers. The ambit of judicial review by the Federal Court is circumscribed in a rather curious fashion in the Access to Information Act and the Privacy Act. In addition, there are possibilities for judicial review of certain matters arising outside the strict context of the legislation. Provisions of the Access to Information Act allow third parties to contest potential governmental decisions to disclose their commercial or proprietary information. Each of these matters will be considered.

A. *The Role of the Commissioners*

A very positive feature of both Acts is the creation of the offices of the Information Commissioner and Privacy Commissioner. Ms. Inger Hansen, Q.C. was appointed Canada's first Privacy Commissioner on 1 October 1977 pursuant to Part IV of the Canadian Human Rights Act.[168] Both Commissioners now have the power to act as mediators prior to ultimate judicial review. In addition, they can act as a possible party in cases before the Federal Court. The intention of the legislation is that most information disputes be settled without the need for recourse to the courts. If the Commissioners' recommendations are accepted by the government institution in question, not only will disputes be settled more expeditiously, but the review of government decisions not to disclose should prove less complicated and less expensive for the average citizen. In addition, the Commissioners will act as useful reporting agencies to Parliament on governmental compliance with the legislation.

Both Commissioners are appointed by the Governor in Council after approval of the appointment by resolution of both the Senate and House of Commons.[169] Each Commissioner holds office for a term of seven years during good behaviour. The Governor in Council may appoint the same person to hold both positions.[170] Both Commissioners are given

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[167] Access to Information Act, subs. 75(2); Privacy Act, subs. 75(2).
[168] S.C. 1976-77, c. 33.
[169] Access to Information Act, subs. 54(1); Privacy Act, subs. 53(1).
[170] Privacy Act, subs. 55(1).

wide investigative powers and protection against criminal or civil proceedings as well as specific protection in respect of libel or slander.[171] Obstructing the Commissioners in the performance of their duties is an offence under the Acts.[172]

The Information Commissioner may either receive or initiate complaints concerning a wide variety of matters.[173] Not only does the Commissioner have the power to investigate the refusal to disclose records requested under the Act, he or she is also specifically empowered to investigate requests dealing with allegedly unreasonable fees, unreasonable extensions of time limits for the disclosure of information, concerns pertaining to the official languages of Canada and in respect of any publication or bulletin required under section 5 of the Act. In addition, the Commissioner may investigate "any other matter relating to requesting or obtaining access to records under this Act".[174]

The Information Commissioner must provide a reasonable opportunity to make representation to complainants, to the head of the government institution concerned and to third parties, where appropriate.[175] It must be pointed out that despite his or her wide investigative powers, the Commissioner may examine only those records "to which this Act applies that are under the control of a government institution".[176] Although no other law or privilege is to apply to the Commissioner, records to which the Commissioner has access are limited to those in the control of the government institution — an expression of uncertain scope.[177] More importantly, confidences of the Cabinet, as broadly defined in the Access to Information Act, are off limits to the Commissioner since the Act does not apply to such records. This impediment may be significant in the exercise of the Commissioner's investigative powers.

A government refusal to provide the claimant with access to a record need not be accompanied by an indication as to whether the record is even in existence.[178] There is no duty on the government institution to indicate that the acknowledgement of a record's existence would harm some specified interest. The government is under no duty to report its decision or to acknowledge a record's existence to the Information Commissioner. There will therefore be no independent review of the government's decision not to acknowledge a record's existence. In other words, an applicant may complain and litigate for what may be a non-existent

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171 Access to Information Act, s. 66; Privacy Act, s. 67.
172 Access to Information Act, s. 67; Privacy Act, s. 68.
173 Access to Information Act, subss. 30(1) & (3).
174 Para. 30(1)(*f*).
175 Subs. 35(2).
176 Subs. 36(2).
177 *See* notes 24, 45 and accompanying text *supra*.
178 Access to Information Act, subs. 10(2).

record. It is regrettable that the Information Commissioner is not to be informed of these situations.[179]

The effective limitation period in which one must complain to the Information Commissioner of a refusal to disclose information is "within one year from the time when the request for the record . . . was received".[180] Since review by the Federal Court is conditional upon a complaint having been made to the Information Commissioner, this one year limitation period would also apply to judicial review.[181] On the other hand, there is no time limit stipulated for the Information Commissioner's report and recommendation. Without any such time limit, the information requested may cease to be relevant if and when it is finally made available. Of more immediate concern, in considering the appropriate level of funding to be allocated to the office of the Information Commissioner, the Governor in Council faces no requirement to make timely access a priority. If the Commissioner is allotted inadequate appropriations, the purpose of the legislation may be frustrated.

Similar powers are granted to the Privacy Commissioner in undertaking his or her responsibilities under the Privacy Act. Many of the same concerns as canvassed in respect of the Information Commissioner also apply to the Office of the Privacy Commissioner. The Privacy Commissioner may receive or initiate complaints on a variety of subjects.[182] In addition to complaints from individuals that personal information has been refused them, the Commissioner may also consider complaints about the improper disclosure of personal information, improper rights to request corrections of personal information or notations of these requests on the record in question, unreasonable time limits, fees or official language concerns and complaints in respect of the Index to Personal Information Banks. A broad general power to hear complaints is also granted.[183]

There is apparently no limitation period in respect of complaints or investigations. The Privacy Commissioner is also under no time limit in making his or her report and recommendations. At the Commissioner's discretion, investigations may periodically be carried out on files contained in exempt information banks.[184] Reports and recommendations in respect of these exempt banks may then be made to the head of the government institution concerned. The compliance by government with such recommendations can be the subject of a parliamentary report.[185] In addition, the Privacy Commissioner may apply to the court

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[179] By contrast, for example, subs. 9(2) of the Access to Information Act requires that the Commissioner be notified of other matters, such as any extension of time limits.

[180] Access to Information Act, s. 31.

[181] S. 41.

[182] Privacy Act, subs. 29(1).

[183] Para. 29(1)(*h*).

[184] Subs. 36(1).

[185] Subs. 36(4).

where, in the Commissioner's opinion, the institution has not adequately complied with recommendations and the court may review any file contained in an exempt bank.[186] The general collection, retention and disposal practices of the government institutions may likewise be made the subject of the Commissioner's random investigation and report to Parliament.[187] As noted, both the Information Commissioner and the Privacy Commissioner are given extensive powers to make annual and special reports to Parliament concerning compliance by institutions with the letter and spirit of the respective Acts.[188] In addition, a permanent parliamentary committee is to be established and the Commissioners' reports are to be referred to the committee.[189] Therefore, it would appear that an appropriate parliamentary review mechanism has also been created under the legislation.

B. *Role of the Federal Court*

Under both Acts the refusal to disclose information may be made the subject of an appeal to the Federal Court, Trial Division. The right to seek judicial review of a decision of a government institution is conditional upon a complaint being made to the Commissioner in question.[190] The complainant must apply to the Court for judicial review within forty-five days of receipt of the report of the Commissioner's investigation or within such period as the Court may allow. The Court may fix a period of time shorter or longer than the forty-five days stipulated.

In practice, a very important power has been conferred upon the Commissioners in the exercise of the complainant's right of judicial review. The Commissioner may apply to the Court for review of any refusal to disclose a record or may appear before the Court on behalf of a complainant or, alternatively, with the leave of the Court, may appear as a party to any review applied for by the complainant.[191] In other words, the applicant may ask the Information Commissioner or the Privacy Commissioner to take on an important precedent-setting case without compensation. Since the Commissioner will have seen the original document in dispute, his or her knowledge of what it contains will greatly assist in the cross-examination of government officials as to the real grounds upon which they seek to prevent disclosure. Both Acts[192] require that judicial review applications shall be heard and determined in a summary way in accordance with any special rules made pursuant to section 46 of the Federal Court Act.[193]

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[186] S. 43.
[187] S. 37.
[188] Access to Information Act, ss. 38, 39; Privacy Act, ss. 38, 39.
[189] Access to Information Act, subss. 40(2), 75(1); Privacy Act, subss. 40(2), 75(1).
[190] Access to Information Act, s. 41; Privacy Act, s. 41.
[191] Access to Information Act, s. 42; Privacy Act, s. 42.
[192] Access to Information Act, s. 45; Privacy Act, s. 44.
[193] R.S.C. 1970, c. 10 (2nd Supp.).

Although the Court is given full discretion concerning costs, ordinarily they will follow the event. However, if the Court is of the opinion that a judicial review application "has raised an important new principle in relation to this Act" the Court shall order that costs be awarded, even if the actual appeal was not successful.[194] While one may applaud the legislative intent in providing an incentive to litigate important issues, it is regrettable that the Court has not provided any explicit jurisdiction to make cost orders of this sort at the commencement of litgation.[195]

Like the Commissioners, the Federal Court is empowered to look at any record "to which this Act applies that is under the control of a government institution".[196] In other words, the Court is unable to look at the confidences of Cabinet.[197] Surprisingly, this limited scope of the Court's access to government records is made explicit in the Privacy Act as regards Cabinet information while it remains implicit in the Access to Information Act. Therefore, if the government institution in question asserts that pertinent information has been made the subject of a Cabinet briefing book or memorandum, such an assertion cannot be reviewed by the Court. This provision is likely to lead to considerable skepticism on the part of applicants for information since neither of the Commissioners in undertaking their review would have had access to such information. The onus of proof is on the government institution to demonstrate that it is "authorized to refuse to disclose" the information in question.[198] Both Acts contemplate, in specified circumstances, *ex parte* and *in camera* proceedings.[199]

A very vexed question relates to the scope of the Court's actual review powers. In the Progressive Conservative forerunner to Bill C-43, there was a clear *de novo* jurisdiction on review. In *all* cases the Court could order disclosure if, in its view, retention of information could not be brought within one of the exemptions.[200] In both the Access to Information Act and the Privacy Act, judicial review is only available for decisions by a government institution to deny access of information. Other matters which may be the subject of complaints to the Commissioners may not be judicially reviewed. The scope of the review in Bill C-43 is much more complicated than in Bill C-15.

Three types of reviews are envisaged. First, in respect of most matters, if the Court determines that the government is not authorized to withhold the record or part thereof, it may order its disclosure.[201] The Court is empowered to add such conditions to its order as it sees fit or to

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194 Access to Information Act, s. 53; Privacy Act, s. 52.
195 McCamus, *supra* note 89, at 277-78.
196 Access to Information Act, s. 46; Privacy Act, s. 45.
197 Access to Information Act, s. 69; Privacy Act, s. 70.
198 Access to Information Act, s. 49; Privacy Act, s. 48.
199 Access to Information Act, s. 52; Privacy Act, s. 51.
200 Bill C-15, 31st Parl., 1st sess., 1979.
201 Access to Information Act, s. 49; Privacy Act, s. 48.

make such other order as it deems appropriate. The second review envisaged is much less clear. For certain kinds of records, the Court is only empowered to order the disclosure of records "if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof".[202] This restriction of the Court's powers on judicial review pertains to records coming within four exemptions in each statute. Three of these exemptions are common to both Acts: (i) federal-provincial affairs; (ii) international affairs and national defence; and (iii) law enforcement and penal security. In addition, under paragraph 18(*d*) in the Access to Information Act, this more restrictive review power applies to the exemption for financial information of the Government of Canada; likewise, in the Privacy Act, under paragraph 24(*a*), it applies to personal information in respect of individuals sentenced for an offence if the disclosure of such information "could reasonably be expected to lead to a serious disruption of the individual's institutional, parole or mandatory supervision program".

Although the exact scope of this more limited review power is uncertain, it appears that secrecy must prevail if the government is able to establish some reasonable grounds for withholding the information. If the Court determines that although these grounds are reasonable, they are not satisfactory or that there are more compelling reasons favouring disclosure, the Court can do nothing.[203] The Court is more concerned with *why* the government institution thought the information should be withheld than with whether disclosure would cause any *harm* to a stated public interest. It is very difficult to believe that a court would characterize the institution's opinion as unreasonable; it is unlikely that case law will generate any judicial standards or guidelines for the application of these exemptions. The Court cannot simply substitute its view for that of the Minister as to whether the document is entitled to be released. Presumably, applicants for information must resort to the Minister's ultimate accountability to Parliament and the electorate for denials of information. A resort to ministerial responsibility in such circumstances is very unlikely to result in disclosure.

Even if one accepts that some of the subject areas listed in the provision may involve political judgment in its more classic form, it is difficult to accept that this limited review power should apply to documents the disclosure of which would be "injurious to law enforcement [or] the conduct of lawful investigations".[204] Similarly, the exemption in the Access to Information Act dealing with the disclosure of documents which might be injurious to the financial interests of Canada is not something for which, arguably, this limited review power is appropriate. In these areas, the courts have direct competence, since they

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[202] Access to Information Act, s. 50; Privacy Act, s. 49.

[203] JUSTICE AND LEGAL AFFAIRS, *supra* note 16, Issue No. 25, A:1-11, at 9 (brief of the Consumers' Ass'n of Can., 2 Apr. 1981).

[204] Access to Information Act, para. 16(1)(*c*); Privacy Act, para. 22(1)(*b*).

are involved in adjudicating prosecutorial proceedings and commercial matters on a daily basis.

> Far from involving ministerial responsibility in the 'political' sense, these decisions require a complete detachment from the normal political environment and instead a commitment to the rule of law. We can think of no institution better able to review the impact of disclosure decisions in this area than the courts.[205]

The third type of review power represents no actual review at all but nonetheless must be re-emphasized. Neither under the Access to Information Act nor the Privacy Act may the Federal Court examine any information which is a confidence of the Cabinet; the legislation does not apply to such records. Nevertheless, it may be argued that the Court has the right to scrutinize a record in order to determine whether or not it is indeed a confidence of the Cabinet but that once having been so determined, the Court is unable to go further, even under the more limited review powers canvassed above. The restriction on the scope of judicial review is perhaps ironic when contrasted with the central role the courts are now required to play in interpreting the Charter of Rights and Freedoms.[206]

C. *Third Party Procedures*

The phenomenon of reverse freedom of information cases has arisen in the United States.[207] This expression refers to those cases in which a private party, usually a corporation, has submitted information to the government and then sues to restrain the disclosure of that information. The exact basis in law for the now commonplace reverse freedom of information suit is not certain. However, the Access to Information Act wisely anticipated a similar trend in Canada and provided appropriate procedures to meet this concern. Nonetheless, individuals seeking information which arguably is confidential business information of a third party may face both lengthy and expensive lawsuits in exercising their rights of access under the Act. The Information Commissioner may intervene in the litigation process, thereby reducing expenses in appropriate cases.

Under the Access to Information Act, a third party is entitled to intervene both before the Information Commissioner and the Federal Court in order to protect certain interests. A third party is defined as "any person, group of persons or organization other than the person that made the request or a government institution".[208] Despite this broad definition, the Act makes clear that there is no procedure available for an individual

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[205] JUSTICE AND LEGAL AFFAIRS, *supra* note 16, Issue No. 20, at 20A:1-92, at 57 (19 Mar. 1981).

[206] Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[207] C. MARWICK, *supra* note 102, at 57-66. The major case on point is Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

[208] Access to Information Act, s. 3.

to be notified and to contest the possible disclosure of his or her *personal information.* As considered above,[209] personal information may be disclosed where the public interest in its disclosure clearly outweighs the invasion of privacy that could result in the disclosure.[210] Third party procedures are available only for the protection of *business* information. To this extent, business confidentiality is given a higher priority in the legislation than confidential personal information.

Under the Access to Information Act, where the government institution intends to disclose any record, in whole or in part, which the head of the institution has reason to believe might contain confidential business information, he or she shall, within thirty days of receiving the request, give written notice to the third party of the request and of the fact that he or she intends to disclose the information.[211] This duty only arises if the third party can reasonably be located and if the third party does not waive this requirement. Within twenty days of notice being given, the third party may make representations to the government institution as to why the information should not be disclosed. The head of the institution has an additional thirty days after the notice is given to make a decision on disclosure. The third party must be given written notice of the decision unless this requirement is waived.

Any decision adverse to the third party must be accompanied by written notice of the right to apply to the Court for a review of the matter within twenty days of the notice being given.[212] At this point, the person requesting the record is also notified and may appear as a party to the review. If the government institution originally decided not to disclose a record but later, on the recommendation of the Information Commissioner, decides to disclose the record in whole or in part, then the third party must be notified and given similar rights.[213] The Information Commissioner, in undertaking his or her investigations, must also notify any third party of pertinent investigations.[214] In addition, where the Commissioner intends to recommend the disclosure of information which the Commissioner has reason to believe must contain confidential business information, reasonable opportunity to make representations shall be given to the third party.[215]

Where appeals are brought by a third party to the Federal Court, the Act does not indicate where the burden of proof should lie. In ordinary cases, the onus of proof is clearly stated to lie with the government institution.[216] However, as Dean McCamus points out:

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[209] *See* text accompanying notes 138, 139 *supra.*
[210] Access to Information Act, subs. 19(2); Privacy Act, subs. 8(2).
[211] S. 28.
[212] Access to Information Act, subs. 28(7); Privacy Act, subs. 44(1).
[213] Access to Information Act, s. 29.
[214] Access to Information Act, s. 33.
[215] Access to Information Act, subs. 35(2).
[216] Access to Information Act, s. 48.

> It would be inappropriate to place the burden on the government in such cases, of course, as it may favour or at least be indifferent to disclosure. Presumably, the burden will be found to rest on the third party either on the basis that this is consistent with the pre-disclosure bias of the general structure of both the substantive and procedural aspects of the scheme or because the third party is normally in exclusive possession of the material facts.[217]

Alternatively, it may be argued that if the third party is applying for review under section 44 then the onus is not on the government institution to justify withholding the record, but rather on the person requesting the record or on the Information Commissioner to justify disclosure. The latter interpretation is buttressed by the failure to mention these proceedings in section 48, which places the general burden of proof on the government institution. This controversy will have to be resolved in litigation.

VI. Crown Privilege and Bill C-43

Schedule III of Bill C-43 substantially alters the law of Crown privilege (or public interest immunity) at the federal level in Canada. Under subsection 41(2) of the Federal Court Act,[218] a federal minister may swear an affidavit that the production of a document in a proceeding would injure certain listed state interests. If such an affidavit is produced, the discovery and production *shall* be refused without any examination of the document by the Court. It was held in the *Keable* case that this absolute privilege applies both in respect of courts and administrative tribunals.[219] The constitutionality of this section has also recently been upheld.[220]

Under Schedule III, this controversial provision of the Federal Court Act is repealed and replaced by a balancing judgment now incorporated in a provision of the Canada Evidence Act.[221] Under the amended Evidence Act, the Superior Courts in Canada are empowered to examine almost all pertinent information for which privilege is claimed by the Crown and to order its disclosure on terms stipulated. If the Court concludes "that the public interest in disclosure outweighs in importance the specified public interest", the Court is empowered to order the disclosure of the information. However, there are two important exceptions to this rule. With respect to information which, if disclosed, would arguably be injurious to international relations or national defence or security, only the Chief Justice of the Federal Court or his designate may hear such applications. These applications shall be heard *in camera*

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[217] McCamus, *supra* note 89, at 278.

[218] R.S.C. 1970, c. 10 (2nd Supp.).

[219] A.G. Que. v. A.G. Can., [1979] 1. S.C.R. 218, 24 N.R. 1, 90 D.L.R. (3d) 161 (1978).

[220] Human Rights Comm'n v. A.G. Can., 41 N.R. 318 (S.C.C. 1982).

[221] R.S.C. 1970, c. E-10, *as amended by* S.C. 1980-81-82, c. 111. The Bill adds ss. 36.1, 36.2 and 36.3 to the Canada Evidence Act. Schedule II was proclaimed on 22 Nov. 1982.

and the government shall be given the opportunity to make representations *ex parte*.[222] The second exception is more onerous. Where the minister or Clerk of the Privy Council objects in any proceedings to production of information by certifying that the information constitutes a confidence of the Cabinet then disclosure "shall be refused without examination or hearing of the information by the Court, person or body".[223] The wide definition of this term found in the Access to Information Act and Privacy Act is contained in the Canada Evidence Act.

The net effect of these changes is not very significant. Under the Federal Court Act, the Crown was able to bar Court review and disclosure of information pertaining to international relations, national defence or security, federal-provincial relations or Cabinet confidences. Under the amendments to the Evidence Act, access may be barred to Cabinet confidences and a strict procedure is established for information pertaining to international relations or national defence or security. No absolute privilege may now be claimed in respect of information pertaining to federal-provincial relations. An absolute privilege continues in respect of Cabinet confidences. Ironically, these are placed on a higher footing than national security information and remain totally off limits to Court scrutiny.

At the provincial level the scope of public interest immunity has been narrowed substantially. It is now fair to state that there is no sacrosanct category of information over which the Crown may claim absolute immunity. Since the historic decision of the House of Lords in *Conway v. Rimmer*,[224] it has been held that the courts are entitled to look behind a Minister's affidavit claiming confidentiality and, in all cases, weigh the competing public interests at stake. Recently both the Australian High Court[225] and the House of Lords[226] have expressly held that the court is ultimately responsible for determining whether a government claim of privilege should succeed. In these judgments the courts repudiated any notion that the government should have exclusive control over these decisions by means of ministerial affidavits. Recent developments in the provinces of Canada have merely applied this liberal trend. Two Canadian courts have decided that they are permitted, in certain circumstances, to inspect Cabinet documents.[227] It is therefore ironic that at the federal level, in spite of the apparent attempt at liberalizing access to government information, this legislation constitutes a retreat from a trend discernible elsewhere in the common law world.

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[222] Canada Evidence Act, R.S.C. 1970, c. E-10, *as amended by* S.C. 1980-81-82, c. 111, s. 36.2.

[223] Subs. 36.3(1).

[224] [1968] A.C. 910, [1968] 1 All E.R. 874 (H.L.).

[225] Sankey v. Whitlam, 21 A.L.R. 505, 53 A.L.J.R. 11 (H.C. 1978).

[226] Burmah Oil Co. v. Bank of England, [1980] A.C. 1090, [1979] 3 All E.R. 700 (H.L.).

[227] *Mannix*, *supra* note 165; *Gloucester Properties*, *supra* note 165.

VII. CONCLUSION

While it may be premature to be overly critical of the freedom of information and privacy reform measures found in Bill C-43, nonetheless some criticisms can be made. The exemptions to the rule of disclosure are drafted in very broad language and contain inappropriate tests in ascertaining whether or not information can and should be disclosed. The scope of judicial review is perhaps unnecessarily complicated. The exclusion of Cabinet records from the purview of the legislation may constitute a gaping loophole.

However, there is a great deal which is commendable in the legislation. Despite the broadly cast exemptions, much information will be revealed under the legislation which has been heretofore unavailable. The creation of the office of the Information Commissioner is a very laudable step toward allowing the ordinary applicant to make use of the new legislation in an economic and expeditious fashion. The legislation may succeed in changing the attitude of the public service toward the release of information. Therefore, in spite of drafting inadequacies in the new legislation, the spirit of the legislation may lead to major, though subtle, changes in the way in which the federal government undertakes its responsibilities.

There is no penalty or sanction on the public servant who disregards the legislation and wrongly denies requests for access to information. Most freedom of information legislation at the state level in the United States establishes offences for improperly refusing to disclose a document.[228] It is expected that such provisions are not necessary in Canada and that the legislation itself will provide sufficient motivation in achieving compliance with its objectives. However, if attitudes do not change as expected, then the mandatory review by a parliamentary committee within three years of proclamation may have to grapple with this concern.[229] It is almost a truism that Canada is becoming an "information society". The technology is also available to make George Orwell's nightmare vision of 1984 a reality. Despite several glaring inadequacies, the legislation merits careful attention by the legal community, which will be integrally involved in determining whether or not these reform measures are successful.

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[228] *See generally, Project: Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, at 1180-87 (1975).

[229] Access to Information Act, s. 75; Privacy Act, s. 75.