

**A THEMATIC COMPARISON OF ACCESS LEGISLATION
ACROSS CANADIAN AND INTERNATIONAL JURISDICTIONS**

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I. EXECUTIVE SUMMARY

A review of the themes covered in this paper reveal a host of issues for discussion, some displaying greater divergencies of approach amongst the jurisdictions considered than others but all of importance for access to information laws (many of these issues have been considered in the Delagrave Report).

As regards 'who is covered', divergence amongst the jurisdictions studied exists in respect of coverage of 'government institutions' operating in the commercial sphere and in respect of legislatures and governing councils (e.g. Cabinet). The *Access to Information Act* sets out a "mixed approach" for the determination of which bodies are to be covered, whereby specific government institutions are listed under the Act while also allowing for the addition of further government institutions by order of the Governor in Council. It has been suggested, however, that a "principled-based approach" should be developed to defining government institutions so as to promote consistency in the application of the Act. In considering how to get the balance right, important issues beyond 'who is covered' will have to be considered, notably whether any exemption is mandatory or discretionary and what oversight, if any, will exist in respect of decisions to limit access (e.g. a certificate from Parliament with respect to Parliamentary records).

As regards 'what is covered', divergence of approach amongst the jurisdictions studied exists as to whether only "records" should be subject to disclosure or all "information", in what form(s), (*i.e.* electronic) disclosure should be required, and whether it is the responsibility of the particular government body in issue to disclose the record or information, *i.e.* whether they are in the "custody" or "control" of that body or whether they should be in the custody and control of that body. In addition, and equally importantly, issues arise as to whether an exemption is mandatory or discretionary and, of course, as to the scope of any exemptions. On the former issue, the paper identifies a divergence of approach as to whether any exemption should be qualified such that where disclosure is in the "public interest", the exemption can be over-ridden (*i.e.* whether it is an "absolute" or a "qualified" exemption). On the latter issue, the paper identifies a divergence of approach around the appropriate scope of exemptions for, amongst other issues, communications between different levels of government (not just foreign governments), records affecting the health and/or safety of individuals, records which may effect the "competitive position" of government bodies, and third party's information in the hands of government.

As regards who may seek access, the principal area of divergence between the jurisdictions studied relates to the question of whether a right to access should be limited to citizens or permanent residents of the jurisdiction or should be extended to any (legal) person who applies regardless of residence or nationality. This issue, of course, raises practical questions as to the implications of any decision

to expand coverage on the resources of those subject to the *Act* and the Information Commissioner.

Another emerging area for discussion arises from the imposition, in certain of the laws surveyed, of a duty to assist parties requesting access. The imposition of such a duty raises issues as to the standard to be achieved, such as the timing of response or the lengths to which government must go to meet the duty (*e.g.* expenditure of resources to provide online access), the guidance provided individuals subject to any such duty, and the role of any entity, charged with overseeing compliance with any such duty.

The paper's study also reveals diversity of approach to the issue of whether fees should be charged to requesters, and if they are, whether there should be discretion to waive (or to increase) the fees depending on the circumstance, *e.g.* the nature of the request or the circumstances of the requester. If a discretion to waive fees is not considered to be appropriate, one alternative adopted by a jurisdiction studied is a pre-established fee structure which relates, for example, to the nature of the request or the circumstances of the requester.

Divergence of approach also exists around the discretion given to government not to respond to requests that are "unreasonable", "frivolous" or "vexatious". Of course allowing, as many jurisdictions do, for the rejection of a request on such grounds raises issues as to how such a discretion is exercised (*i.e.* what is "frivolous") and whether and how such an exercise of discretion is overseen by an 'independent' body.

Moving beyond the fundamental questions as to the scope of the right of access, the jurisdictions studied reveal a diversity of approach to a number of issues with respect to the role of oversight bodies such as the Information Commissioner. As regards the Information Commissioner's mandate, the question arises as to whether it is preferable that the mandate be expressed in general, or in specific, terms in the *Act* and, if the latter, what those specific terms should include, such as:

- making recommendations to Parliament for amendment to the law
- making recommendations to Parliament regarding the implications for access to information of any other proposed federal law
- undertaking the (general) education of the public in respect of access to information
- monitoring the compliance of government with any duty to assist
- providing training to government with respect to compliance with the law

- providing ongoing guidance to government with respect to the interpretation of the law
- representing a requesting party, or the Commissioner, in legal proceedings.

In addition, in respect of the traditional role of investigating complaints of non-compliance with the law, the jurisdictions studied reveal a diversity of approach to the question of whether the Information Commissioner should be able to order disclosure and, if so, whether he or she should be the “last word”, *i.e.* subject to appeal. If the Information Commissioner is subject to appeal, the question arises as to whether the appeal should be to a Court or simply to another part of government empowered to over-ride the Commissioner’s Order and who should be entitled to seek an appeal. In addition, the jurisdictions studied reveal a diversity of approach to whether bodies, such as the Information Commissioner should assume the additional role of mediating disputes between a party seeking access and a government institution? If so, how formal (or informal) must any such mandate be expressed in the law and what is the scope of this alternative dispute resolution mechanism?

The jurisdictions studied also utilize different tools to encourage and/or secure compliance with the law. For example, jurisdictions have different mandatory response times and different approaches to extensions of those times.

Review of government decisions on access, by both the applicant and third parties affected by any such application, is uniformly provided across jurisdictions, however, some have provided for a further (or alternative) level of review by an ombudsman. Indeed, some jurisdictions provide for ombudsman to oversee the decisions of the Information Commissions. Provision of multi-tiered review, obviously, has implications for cost and time to resolution of any dispute.

II. INSTITUTIONS COVERED BY ACCESS LEGISLATION

A. Process and criteria for inclusion as a “government institution”

Access to Information Act

Any access to information regime must address both the scope of coverage of the legislation (to which institutions does the legislation apply?), as well as the process through which these institutions become covered. The ATIA defines its scope as applying to records under the control of “government institutions”, which institutions are defined under section 3 as:

(a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*.

Section 77(1) of the Act allows the Governor in Council to make regulations “prescribing criteria for adding a body or office to Schedule 1” and, by order, to “amend Schedule 1 by adding thereto any department, ministry of state, body or office of the Government of Canada.” Interestingly, removal from Schedule 1 requires an Act of Parliament.

Effective September 1, 2007, the *Federal Accountability Act*¹ expanded the scope of the ATIA to include wholly owned subsidiaries of Crown corporations covered by the Act and provided that the following Crown corporations are now subject to the Act: Canadian Broadcasting Corporation; VIA Rail Canada Inc.; Atomic Energy of Canada Limited; National Arts Centre; Public Sector Pension Investment Board; Export Development Canada; and Canada Post Corporation.

Other Jurisdictions

Just as with the *Access to Information Act*, the legislation in each jurisdiction examined contains criteria to determine which bodies are to be subject to the access law. While the ATIA refers to these bodies as “government institutions”, they are also referred to as “public bodies”, “departments”, “institutions”, etc. in the various statutes examined. In some jurisdictions, the approach is to list the public bodies in the statute itself (or in appendix thereto), while other jurisdictions simply provide a formula for determining whether a body is a public body.² As with the ATIA above,

¹ S.C. 2006, c. 9 (assented to December 12, 2006).

² Please see Appendix “A” for a summary of approaches for this in use by various Canadian provinces.

the United Kingdom has a mixed approach, listing specific bodies, while also allowing for further bodies to be designated as public bodies.

(i) *New Zealand*

New Zealand's *Official Information Act 1982*³ provides for the disclosure of any "official information", unless there is a good reason under the legislation to prevent such disclosure. With some exceptions, "official information" is any information held by: a Minister of the Crown in his official capacity; Government departments and organizations; state-owned enterprises; and bodies that carry out public functions, and includes any information held outside New Zealand by any branch or post of a department or an organization. As in Canada, the bodies (departments and organizations) covered under the statute are listed in a schedule and may be amended from time to time, in addition to bodies that are listed in the *Ombudsmen Act*.⁴ Agencies covered by the act include Crown health enterprises and regional health authorities and educational institutions, including boards of trustees.

(ii) *United Kingdom*

The *Freedom of Information Act 2000*⁵ applies to information held by a public authority. A "public authority" is defined in s. 3 as "any body which, any other person who, or the holder of any office which" is listed in the schedules, designated under s. 5 or is a publicly-owned company. A body may be added to Schedule 1 by the Secretary of State, pursuant to s. 4, where:

(2) ... the body or office

(a) is established by virtue of Her Majesty's prerogative or by an enactment or by subordinate legislation, or

(b) is established in any other way by a Minister of the Crown in his capacity as Minister, by a government department or by the National Assembly for Wales. [and]

(3)...(a) in the case of a body, that the body is wholly or partly constituted by appointment made by the Crown, by a Minister of the Crown, by a government department or by the National Assembly for Wales, or

³ (N.Z.), 1982/156 ["NZ OIA"].

⁴ *Ombudsmen Act 1975* (N.Z.), 1975/9, 35 RS 469. A directory of which bodies are covered by the NZ OIA is maintained by the Ministry of Justice, and includes a section listing organisations which are no longer subject to the legislation: <http://www.justice.govt.nz/pubs/reports/2006/directory-of-official-information/index.html>.

⁵ (U.K.), 2000, c. 36 ["UK FOIA"]. Note that the *Freedom of Information (Scotland) Act 2002*, 2002 A.S.P., applies in Scotland.

(b) in the case of an office, that appointments to the office are made by the Crown, by a Minister of the Crown, by a government department or by the National Assembly for Wales.

Section 5 allows the Secretary of State to designate a body, person or office as a public authority that does not meet the above criteria, but that:

(a) appears to the Secretary of State to exercise functions of a public nature, or

(b) is providing under a contract made with a public authority any service whose provision is a function of that authority.

The British legislation contains provisions for removing bodies from the Schedule if a body or office holder ceases to satisfy either of the conditions above or ceases to exist.

(iii) *United States*

The US *Freedom of Information Act*⁶ applies to records held by agencies and departments of the executive branch of the federal government, including any cabinet departments, military departments, government corporations, government controlled corporations, independent regulatory agencies, and other parts of the executive branch of the Government, or any independent regulatory agency. The act even applies to the CIA and FBI (however there are special exemptions for requests by foreign governments or organizations). The FOIA does not apply to the federal judiciary, elected officials of the federal government (as well as the Offices of the President and Vice President), or state and local governments.⁷

(iv) *Mexico*

The *Federal Law for Transparency and Access to Public Government Information*⁸ applies to “compelled bodies”, which are defined in Article 2 as:

a) The Federal Executive Power, the Federal Public Administration, and the Attorney General’s Office;

⁶ 5 U.S.C. § 552 [“US FOIA”].

⁷ U.S., Committee On Government Reform, *A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records* (H.R. Rep. No. 109-226) (Washington, D.C.: U.S. Government Printing Office, 2005) at 6, online, <<http://www.Gpoaccess.Gov/Congress>>. Note that there may be some access to the materials of former Presidents however.

⁸ As translated by the Federal Institute for Access to Public Information, online: <<http://www.ifai.org.mx/publicaciones/taia.pdf>>.

- b) The Federal Legislative Power, formed by the Chamber of Deputies and the Chamber of Senators, the Permanent Commission and any of its bodies;
- c) The Federal Judicial Power of the Federation and the Council of the Federal Judicature;
- d) Any autonomous constitutional body;⁹
- e) Any federal administrative court, and
- f) Any other federal body.

Conclusion

The “mixed approach” set out in the *Access to Information Act* for the determination of which bodies are to be subject to the act, including the listing of specific government institutions covered while also allowing for the listing of further government institutions, provides flexibility, as illustrated by the recent additions of a number of Crown corporations under the *Federal Accountability Act*. While the flexibility of this approach provides for convenience, some, notably the Delagrave Report,¹⁰ suggest that a principled-based approach should be developed for purposes of determining which public bodies or government-funded institutions are properly brought within the auspices of the Act.

B. Parliament and Legislative Branches of Government

Access to Information Act

While the Act does not apply to Parliament, including the House of Commons, the Senate and the Library of Parliament, the 2002 Delagrave Report included a recommendation to extend coverage over these institutions.¹¹ Any such extension would have to address the issue of parliamentary privilege, and consider whether information subject to parliamentary privilege would be excluded. Any expansion of the Act’s coverage over Parliament would also need to consider

⁹ Defined as: the Federal Electoral Institute, the National Commission of Human Rights, the Bank of Mexico, the universities and any other academic institutions of higher studies that have received autonomy by law, and any other organization established in the Political Constitution of the United Mexican States.

¹⁰ Access to Information Review Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Public Works and Government Services, 2002) [“Delagrave Report”].

¹¹ As above, one area in which the Act’s coverage over Parliament has recently expanded is in relation to agents of Parliament, including the Chief Electoral Officer, the Auditor General, the Commissioner of Official Languages, the Information Commissioner and the Privacy Commissioner, which have all been brought within the ambit of the Act by recent amendment to Schedule 1.

whether the records of political parties should fall within the scope of access granted, as well as the records held by individual MPs and Senators.

Other Jurisdictions

There is significant variation across the jurisdictions examined on whether the access statutes apply to legislatures.

(i) *Prince Edward Island*

The definition of “public authority” in P.E.I.’s *Freedom of Information and Protection of Privacy Act*¹² does not include “the office of the Speaker of the Legislative Assembly and the office of a Member of the Legislative Assembly.”

(ii) *Alberta*

The definition of “public body” in the *Freedom of Information and Protection of Privacy Act*¹³ contains the same exclusion as that of P.E.I. above. Furthermore, s. 4 provides that the Act does not apply to records in the custody or under the control of an officer of the Legislature relating to the exercise of that officer’s functions under an Act of Alberta; information under the control of the Ethics Commissioner relating to the disclosure statements of deputy ministers and other senior officers that have been deposited with the Ethics Commissioner; personal or constituency records of an elected member of a local public body or the Executive Council; a personal record of an appointed or elected member of the governing body of a local public body; a personal record or constituency record of a member of the Executive Council; a record created by or for the office of the Speaker of the Legislative Assembly or the office of a Member of the Legislative Assembly that is in the custody or control of the Legislative Assembly Office; a record created by or for a member of the Executive Council, the Legislative Assembly, or a chair of a Provincial agency who is a Member of the Legislative Assembly, provide all of these records of information has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the *Financial Administration Act*¹⁴ who is a Member of the Legislative Assembly.

(iii) *Newfoundland & Labrador*

Pursuant to recent amendments, the *Access to Information and Protection of Privacy Act*¹⁵ applies to the provincial legislature. The definition of “public body”

¹² R.S.P.E.I. 1988, c. F-15.01 [“P.E.I. FIPPA”].

¹³ R.S.A. 2000, c. F-25 [“AB FIPPA”].

¹⁴ R.S.A. 2000, c. F-12.

¹⁵ S.N.L. 2002, c. A-1.1 [“Nfld. AIPPA”].

includes “the House of Assembly and statutory offices, as defined in the *House of Assembly Accountability, Integrity and Administration Act*”. Requests for access to information for the House of Assembly are made to the speaker and requests related to statutory offices are made to the applicable officer of the statutory office. The Act does not apply to personal or constituency records of a member of the House of Assembly that are in the possession or control of the member or to records of a registered political party or caucus as defined in the *House of Assembly Accountability, Integrity and Administration Act*.¹⁶ Subsection 30.1 contains a mandatory exemption to disclosure, providing that:

30.1 The Speaker of the House of Assembly or the officer responsible for a statutory office shall refuse to disclose to an applicant information

(a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly;

(b) that is advice or a recommendation given to the speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission established under the *House of Assembly Accountability, Integrity and Administration Act* that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; and

(c) in the case of a statutory office as defined in the *House of Assembly Accountability, Integrity and Administration Act*, records connected with the investigatory functions of the statutory office.

(iv) *Nova Scotia*

The Office of the Legislative Counsel is specifically excluded from the definition of a public body in s. 3(j) of Nova Scotia’s *Freedom of Information and Protection of Privacy Act*.¹⁷

(v) *Ontario*

Section 1.1 of Ontario’s *Freedom of Information and Protection of Privacy Act*¹⁸ provides a limited right of access over the provincial assembly, but only in relation to “records of reviewable expenses of the Opposition leaders and the persons

¹⁶ S.N.L. 2007, c. H-10.1.

¹⁷ S.N.S. 1993, c. 5 [“NS FIPPA”].

¹⁸ R.S.O. 1990, c. F.31 [“ON FIPPA”].

employed in their offices and in respect of the personal information contained in those records".¹⁹ While it appears incongruous that Ontario's act only applies to "Opposition leaders" and those employed in their offices, and not to the government, section 1.1 was added to the act at the same time as the introduction of the *Cabinet Ministers' and Opposition Leaders' Expenses Review and Accountability Act, 2002*),²⁰ and address the concerns raised in that separate Act.

(vi) *United Kingdom*

Under s. 34 of the UK FOIA, information will be exempted if it is required in order to avoid an infringement of Parliamentary privilege. A certificate signed by the Speaker of the House of Commons or the Clerk of the Parliaments certifying that the exemption was or is required for the purpose of protecting this privilege is "conclusive evidence of that fact."

(vii) *Mexico*

In Mexico, while the legislature is not specifically covered, "the Law provides that the Legislative and Judicial powers, as well as any autonomous constitutional entities, such as IFE, Bank of Mexico and other public institutions with autonomy like UNAM, are obligated to establish their own criteria and procedures, so you can access their information. These criteria and procedures can differ, according to the institution."²¹

Conclusion

Coverage of parliamentary institutions by access laws remains an area of divergence amongst jurisdictions. While all seem agreed that parliamentary privilege deserves protection, the scope of that protection, e.g. the exemption of administrative records of parliamentary institutions, is in debate. Of course, if Parliament and its institutions are included under the Act at some stage, any such amendment would also likely have to address the need for a mechanism to review a decision by Parliament not to disclose information. The jurisdictions studied provide different approaches to this issue.

¹⁹ The ON FIPPA applies to all ministries of the Government of Ontario as per the definition of "institution" in section 2.

²⁰ S.O. 2002, c. 34, Sch. A.

²¹ Federal Institute for Access to Public Information, *Transparency, Access to Information and Personal Data: Regulatory Framework* (August 2004) at 124, online: <<http://www.ifai.org.mx/publicaciones/taia.pdf>>.

C. Cabinet Confidences

Access to Information Act

As per the exclusion established at section 69(1), the Act “does not apply to confidences of the Queen’s Privy Council for Canada”. This means that when the government is preparing a response to an access to information request, documents falling within the definition of a Cabinet confidence would not be included and these exemptions are not reviewable by the Commissioner.²² The Cabinet confidences exclusion does not apply where the information is more than twenty years old, or to discussion papers concerning decisions that have been made public or concerning decisions that have not been made public, but four years have passed since the decisions were made.

Other Jurisdictions

While the Act contains an exclusion for Cabinet confidences, provincial and other jurisdictions more commonly provide an exemption for this type of information. With the exception of New Brunswick, all Canadian jurisdictions have an exemption for certain Cabinet documents and records. These exemptions do not apply once a certain number of years have passed since a document’s creation; this time limit ranges from 10 years in Nova Scotia to 25 years or more in Québec. For those jurisdictions which do exclude Cabinet confidences from the operation of the relevant legislation, the records exempted are generally narrower than the list found at s. 69(1)(a) to (g) of the *Act*. In addition, instead of setting out different types of records covered, other jurisdictions focus on information that would reveal the substances of deliberations of Cabinet. Indeed, New Zealand discloses Cabinet documents.

²² Cabinet confidences are particularly defined under this section as including (without restricting the generality of the foregoing):

- (a) memoranda the purpose of which is to present proposals or recommendations to Council;
- (b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
- (c) agenda of Council or records recording deliberations or decisions of Council;
- (d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);
- (f) draft legislation; and
- (g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).

(i) *Prince Edward Island*

Pursuant to s. 20 of the *Freedom of Information and Protection of Privacy Act*, unless Cabinet consents, there is no access to information that would reveal the substance of deliberations of Cabinet or its committees, including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive. There can however be access if the information is more than twenty years old or the information is in a record of decision made by the Executive Council or any of its committees on an appeal under the Act.

(ii) *British Columbia*

Cabinet and local public body confidences are protected under section 12 of British Columbia's *Freedom of Information and Protection of Privacy Act*.²³ There is a mandatory exemption that prohibits disclosure of Cabinet confidences and information of certain committees. This exemption applies to information and confidences which are no more than fifteen years old. This section also includes a discretionary exemption relating to information of a local public body.

(iii) *Nova Scotia*

Section 13 contains an exemption for deliberations of Executive Council which is largely similar to that in s. 12 of British Columbia's statute; however the exemption in Nova Scotia is discretionary:

13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

(iv) *Québec*

Cabinet confidences are addressed in s. 33 of *An Act respecting Access to documents held by public bodies and the Protection of personal information*²⁴. The Québec provisions are different from many other jurisdictions, providing that, in many cases, the person who authored or received the confidences authorizes their release.

²³ R.S.B.C. 1996, c. 165 ["BC FIPPA"].

²⁴ R.S.Q., c. A-2.1 ["QC APBA"].

(v) *New Brunswick*

New Brunswick is the only Canadian province where the access legislation does not specifically provide for exemptions relating to Cabinet Confidences. Protection for certain Cabinet information can be found using the following exemptions listed in section 6 of the *Right to Information Act*:²⁵

s6. There is no right to information under this Act where its release

(a) would disclose information the confidentiality of which is protected by law; ...

(g) would disclose opinions or recommendations for a Minister or the Executive Council;

(h) would disclose the substance of proposed legislation or regulations.

(vi) *New Zealand*

The *Official Information Act 1982* does not apply to members of Parliament acting as such; however the Act does apply to Ministers of the Crown acting in their official capacity. While the general exemptions of the Act may apply in certain situations, the *Official Information Act 1982* does not contain any blanket exemptions for Cabinet confidences. It is reported that Cabinet documents are routinely disclosed.²⁶ Ministers are also encouraged to proactively release Cabinet material, which is most often published on the Internet. The following guidance applies to the proactive release of Cabinet materials:

- a. Only Ministers may approve the proactive release of Cabinet material (they may wish to first discuss the proposed release with Cabinet colleagues).
- b. The person administering the release of the material should:
 - assess the information in light of the principles in the *Official Information Act 1982*, the *Privacy Act 1993*, and the *Security in the Government Sector* manual; and
 - consider deleting any information that would have been withheld if the information had been requested under the *Official Information Act 1982*.

²⁵ S.N.B. 1978, c. R-10.3 [“NB RTIA”].

²⁶ Privacy International, *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws*, by David Banisar at 22 [“FOI Survey”], online: <<http://www.privacyinternational.org>>.

- c. Where appropriate, papers and relevant minutes should be published together so that readers have the background to the decisions made by Cabinet.
- d. The material released should preferably show that it has been approved for release.
- e. If the material is to be published online, the current *New Zealand Government Web Standards and Recommendations* should be followed.²⁷

(vii) *Australia*

Cabinet confidences are exempted under the Australian *Freedom of Information Act 1982*.²⁸ There is an exception to this rule where the document or portion requested contains purely factual material, provided that disclosure would not reveal any deliberations or decisions of Cabinet that has not been officially published. Ministers may issue certificates signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that the document is exempt, the only review of these certificates allowed on appeal is a determination of whether it was reasonable for the Minister to claim that the exemption was provided for by the Act.²⁹

Conclusion

The wide scope of exclusion given to Cabinet confidences under the Act contrasts with the narrower exemptions found in most of the provinces and certain foreign jurisdictions.³⁰ Moreover, because documents are excluded under the Act, there is no opportunity to review the documents to see whether they should be excluded or not. In other jurisdictions, the ombudsman may review the claimed exemption and agree or disagree. New Zealand, of course, offers the widest access to Cabinet documents.

²⁷ Department of the Prime Minister and Cabinet, *Cabinet Manual 2008* (Wellington, New Zealand: Cabinet Office, 2008), online: <<http://www.cabinetmanual.cabinetoffice.govt.nz/files/manual.pdf>>.

²⁸ No. 3 (1982) ["FOIA 1982"]. Section 34 provides that documents of Cabinet and Cabinet committees are exempt from access requests.

²⁹ Ministerial certificates may also be issued for other categories of exemptions, including national security and defence, and Commonwealth/State relations.

³⁰ *E.g.* they focus on information that would reveal the substance of Cabinet deliberations, decisions and submissions.

D. Minister's Offices

Access to Information Act

As above, the Act applies to information “under the control of a government institution”. While Cabinet confidences are excluded from this definition as per s. 69(1), the Act does not explicitly state whether a Minister’s office is included as part of a “government institution”, or whether a Minister’s office is considered separate from a “government institution.” The federal government has taken the position that a Minister’s office is distinct from the government institution or department over which the Minister presides. This interpretation leaves records under the control of a Minister’s office outside of the bounds of the Act. In *Canada (Information Commissioner) v. Canada (Attorney General)*,³¹ the Federal Court reviewed a refusal to disclose copies of the Prime Minister’s Agenda and minutes of management meetings of the Minister of National Defence on the grounds that the records were under the control of the Prime Minister’s Office and Minister of National Defence, and that neither of these were “government institutions”. The Federal Court recognized that government departments have separate functions from minister’s offices, and noted that neither the Minister of National Defence or the PMO was listed under Schedule 1 (and are still not listed today).

Other Jurisdictions

In general, an interpretation of the *Access to Information Act* restricting access to records controlled by a Minister’s office is consistent with the approach found in other provincial and international jurisdictions. One jurisdiction reviewed seem to distinguish between ‘political’ information which may be found in a Minister’s office, and information regarding the functioning of the government department which the Minister oversees.

(i) *Saskatchewan*

According to ss. 2 and 5, the *Freedom of Information and Protection of Privacy Act*³² applies to government institutions, which include: the office of Executive Council or any department, secretariat, or other similar agency of the executive government of Saskatchewan, but not the Legislative Assembly Service or offices of members of the Assembly or members of the Executive Council.

³¹ [2000] F.C.J. No. 1648, [2005] F.C.J. No. 926 (F.C.A.), leave to appeal refused [2005] S.C.C.A. No. 356.

³² S.S. 1990-91, c. F-22.01 [“SK FIPPA”].

(ii) Manitoba

Manitoba presents a different approach in that the list of public bodies covered by Manitoba's *Freedom of Information and Protection of Privacy Act*³³ includes the office of a minister. The Act does not apply to the office of a Member of the Legislative Assembly who is not a minister or the office of an officer of the Legislative Assembly.

(iii) Newfoundland & Labrador

Pursuant to s. 5, the *Access to Information and Protection of Privacy Act* does not apply to:

(c) a personal or constituency record of a member of the House of Assembly, that is in the possession or control of the member;

(c.1) records of a registered political party or caucus as defined in the House of Assembly Accountability, Integrity and Administration Act;

(d) a personal or constituency record of a minister.

(iv) United Kingdom

Under section 35 of the U.K. FOIA, information held by a government department or by the National Assembly for Wales is exempt if it relates to the formulation or development of government policy, Ministerial communications, or the operation of any Ministerial private office.

Conclusion

The federal government's interpretation of the *Access to Information Act* as not applying to records under the control of Minister's offices is consistent with most, though not all, of the jurisdictions examined.

E. Officers of Parliament***Access to Information Act***

The *Federal Accountability Act* expanded the coverage of the Act to include certain agents of Parliament, including the Offices of the Information and Privacy Commissioners, the Office of the Commissioner of Official Languages, the Office of

³³ C.C.S.M. c. F175 ["MB FIPPA"].

the Chief Electoral Officer, and Office of the Auditor General. While there is no mechanism in the Act for investigations of the Commissioner's own decisions as to whether or not to disclose information pursuant to an access request, an *ad hoc* Commissioner, Justice Cory, has been appointed to investigate complaints made against the Commissioner in relation to the handling of these requests. The *ad hoc* Commissioner has the same powers and duties as the Information Commissioner for conducting investigations and making recommendations.³⁴ The *ad hoc* Commissioner's mandate is limited, however, to the investigation of complaints arising from requests made to the Information Commissioner; he has no authority to review the Commissioner's activities regarding complaints received about any other federal institution.

Other Jurisdictions

Provincial statutes, such as those of Alberta and P.E.I. provide for the appointment of an adjudicator to review decisions made by the Commissioner as the head of a public body. Other access statutes contain provisions for oversight of the Commissioner in general.

(i) Alberta

Alberta's *Freedom of Information and Protection of Privacy Act* provides for review of the Commissioner's decisions (ss. 75-81). An adjudicator may be appointed to investigate allegations about the Commissioner's investigations in response to complaints under the Act, including where the Commissioner may be in a conflict of interest.³⁵ (s. 78) The adjudicator has the same powers as the Commissioner, which includes the power to make binding decisions. Requests for review of the Commissioner pursuant to s. 77³⁶ may be made by applicants who made a request to the Commissioner for access, third parties, or persons who believe their personal information has been collected, used or disclosed contrary to the Act.

Section 47 provides for removal of the Commissioner for a cause due to incapacity.

³⁴ Office of the Information Commissioner of Canada, "*Ad Hoc* Commissioner and Complaints against the Information Commissioner" (2007), online: <<http://www.infocom.gc.ca/publications/default-e.asp>>.

³⁵ AB FIPPA, ss. 75(1) and 78.

³⁶ Section 77 of the AB FIPPA applies:

- (a) to a decision, act or failure to act of the Commissioner when acting as the head of the Office of the Information and Privacy Commissioner, and
- (b) if the person who is appointed as the Commissioner is, at the same time, appointed as any other officer of the Legislature, to a decision, act or failure to act of that person when acting as the head of that office.

(ii) *Prince Edward Island*

P.E.I.'s *Freedom of Information and Protection of Privacy Act* contains virtually the same provisions as Alberta regarding review of the Commissioner's decisions made as the head of a public body.³⁷ Subsection 68.7(6) provides that an order made by the adjudicator is final.

(iii) *Newfoundland & Labrador*

The *Access to Information and Protection of Privacy Act* provides that a Commissioner may be removed or suspended for incapacity, neglect of duty or misconduct.³⁸

(iv) *Mexico*

Mexico's Federal Institute of Access to Public Information is composed of five commissioners, named by the President. Article 34 states that commissioners "can only be relieved of their functions if they seriously or repeatedly violate the regulations contained in the Constitution and this Law, if they have been sentenced for a serious crime that merits corporal punishment, or if their acts or omissions affect the authority of the Institute."

(v) *United Kingdom*

The Information Commissioner is overseen by the Information Tribunal. The Tribunal reviews and may overrule decisions of the Commissioner. Section 57 provides that decision notices issued by the Commissioner may be appealed to the Tribunal by the complainant or the public authority. If the Tribunal finds an error of law or in the Commissioner's exercise of discretion, it may allow the appeal or substitute other notice that could have been served by the Commissioner. Decisions of the Tribunal may be appealed to the courts.

Conclusion

The Information Commissioner is subject to limited review by an *ad hoc* Commissioner; no provision addresses the question of what happens if a requesting party is not satisfied with the decision of the *ad hoc* Commissioner. Alberta and the U.K. offer different models of oversight that may be considered.

³⁷ P.E.I. FIPPA, paragraphs 68.1-68.9.

³⁸ Nfld. AIPPA, s. 42(3).

III. RECORDS COVERED BY THE LEGISLATION

A. Application of the statute

Access to Information Act

Section 4(1) gives a right to access “any record under the control of a government institution”. The Act therefore applies, subject to its exceptions, to a “record” which is “under the control” of a government institution. “Record” is defined in s. 3 as “any documentary material, regardless of medium or form”. However, as the statute does not define “under the control of”, its interpretation has been left for the courts.

The Federal Court and Federal Court of Appeal have generally taken the position that they should give the definition of “control” a liberal and purposive construction without reading in limiting words not found in the Act.³⁹ In general, mere physical possession of the record in question is sufficient to require the government institution to disclose the requested information under section 4(1).

Other Jurisdictions

Not all jurisdictions examined have legislation that applies to a “record” or similar term, and then proceeds to define the term. In fact, there are two general approaches to determining what is subject to disclosure. The first, which is seen in many jurisdictions (including all Canadian jurisdictions), is to provide for access to “records” or “documents”.⁴⁰ The second approach, more recently adopted, is to provide access to information, regardless of its form, e.g. New Zealand.

With some noted exceptions, the provincial statutes generally apply to all records in the custody or under the control of a public body, including court administration documents. With the exception of Québec, the provincial statutes do not definite custody and control. In the United States, the FOIA appears to require both custody and control. Some jurisdictions, such as the United Kingdom, extend the scope beyond what is actually held by the public body.

(i) British Columbia

British Columbia’s Act applies to:

³⁹ See, by way of example, *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] F.C. 110 (F.C.A.).

⁴⁰ In British Columbia, Alberta, Saskatchewan, P.E.I., Manitoba, Nova Scotia and Newfoundland, “record” does not include computer programs or other mechanisms that produce records. Instead of “record”, the statutes in New Brunswick and Québec use “document”.

3(1) ... all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;

(b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity;

(c) subject to subsection (3), a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

Proposed Addition -- 3(1)(c.2)

(c.2) a record that is created by or for, or is in the custody or control of, the Secure Care Board and that relates to the exercise of that board's functions under the Secure Care Act [Not in force];

(d) a record of a question that is to be used on an examination or test;

(e) a record containing teaching materials or research information of employees of a post-secondary educational body;

(f) material placed in the archives of the government of British Columbia by or for a person or agency other than a public body;

(g) material placed in the archives of a public body by or for a person or agency other than a public body;

(h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

(i) a record of an elected official of a local public body that is not in the custody or control of the local public body.

The definition of "record" attempts to list everything that is covered rather than providing a general definition:

“Record” includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records.

(ii) *Manitoba*

Manitoba has a more broad definition of record than British Columbia, which is more consistent with the examined jurisdictions:

“record” means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, on any storage medium or by any means including by graphic, electronic or mechanical means, but does not include electronic software or any mechanism that produces records.

(iii) *Ontario*

“Record” is defined as:

any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution.

The Access and Privacy Office maintains an *Annotation* to assist in interpreting the access legislation; the Annotation to s. 10 provides guidance on custody and control:

Some of the factors that may be considered in determining custody or control are: 1. was the record created by an officer or employee of the institution? 2. what use was intended to be

made of the record? 3. did the institution have possession of the record? 4. if the institution did not have possession, was it created as a result of the duties of an employee and is it being held by the employee? 5. does the institution have the right to possess the record? 6. does the content of the record relate to the institution's mandate and function? 7. does the institution have the authority to regulate the record's use? 8. to what extent has the record been relied upon by the institution? 9. how closely is the record integrated with other records held by the institution? 10. does the institution have the authority to dispose of the record? The term "custody" should be given broad meaning and only in rare circumstances would physical possession not suffice as custody.

Some factors that may be considered in determining control are:

1. Does the Institution have a statutory power/duty to carry out activity resulting in creation of records? 2. Is the activity a "core", "central" or "basic" function of the institution? 3. Are there any provisions in contracts between the institution and third party giving the institution the right to possess or control the records? 4. Was there an understanding by the institution and third party that the record was not to be disclosed to the institution? 5. Who paid for the creation of the record? 6. Was the third party an agent of the institution? Did that agency include a right for the institution to possess or otherwise control the records? 7. What is the customary practice of the institution and similar institutions in relation to possession or control of records of this nature in similar circumstances? 8. What is the customary practice of the third party and others in a similar trade in relation to possession or control of records of this nature in similar circumstances? 9. To what extent did the institution rely or intend to rely on the record? 10. Who owns the record?

(iv) *New Zealand*

The *Official Information Act 1982* provides wide access to "information", rather than just documents, or what has physically been recorded:⁴¹

5 The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly

⁴¹ FOI Survey, *supra* note 27 at 112: "In New Zealand, the right to information has been interpreted to mean that information which is known to the agency but not yet recorded, must be recorded if it is relevant to the request."

requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

Official information is any information held by various bodies, discussed in more detail above, in Section II.A. Official information means any information held by: a Department; Minister of the Crown in his official capacity; or an organization. It does not include, for example:

[I]nformation which is held by a Department, Minister of the Crown, or organisation solely as an agent or for the sole purpose of safe custody and which is so held on behalf of a person other than a Department or a Minister of the Crown in his official capacity or an organisation.

(v) *United States*

The US FOIA applies to records in any format, which include electronic records, and has recently been amended⁴² to include information held by an agency under Government contract:

(2) 'record' and any other term used in this section in reference to information includes –

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

Care and control of an agency is not defined in the FOIA, however the case law on whether there is sufficient "control" over a record has identified four factors for the agency to consider in determining whether the record requested is an "agency record":

[T]he intent of the record's creator to retain or relinquish control over the record; the ability of the agency to use and dispose of the record as it sees fit; the extent to which agency personnel have read or relied upon the record; and the degree

⁴² *Openness Promotes Effectiveness in our National Government Act of 2007*, S. 2488 (the bill was signed into law December 31, 2007. This is also referred to as the *OPEN Government Act of 2007*).

to which the record was integrated into the agency's recordkeeping system or files.⁴³

This test also applies where the requested records were generated by a government contractor (who is not otherwise subject to the FOIA).

(vi) *Mexico*

The *Federal Law for Transparency and Access to Public Government Information* applies to “information in the hands of any of the Powers of the Republic, any of the autonomous bodies and any other federal entity.” Article 2 provides that: “All government information referred to in this Law is deemed public and all individuals shall have access to said information based upon the provisions set forth in this Law.” “Information” is defined as anything contained in documents generated, obtained, acquired, transformed or kept by public bodies. “Documents” are defined broadly as:

All files, reports, tests, certificates, resolutions, official letters, correspondence, agreements, policies, guidelines, memos, contracts, covenants, orders, notes, memoranda, statistics or any other registry or record that documents the exercise of the abilities or activities of the compelled agencies and public servants, regardless of the source or the issuance date. Documents may be found in any means such as written, printed, oral, visual, electronic, informative, or holographic.

The duty to provide information is limited to what a department or entity actually holds (Art. 42), however where the information does exist but belongs to another authority, the applicant is to be notified which department they should have made their request to (Art. 40). Article 42 also provides that where the requested information is already in the public domain, the response must inform the applicant where the information is and how it can be accessed.

(vii) *United Kingdom*

Subject to exemptions, any person has the right to be informed whether the public authority holds the requested information, and if it does, “to have that information communicated” to him/her. “Information” is “information recorded in any form”. Information is deemed to be held by the public authority pursuant to s. 3(2), where: “(a) it is held by the authority, otherwise than on behalf of another person, or (b) it is held by another person on behalf of the authority.”

⁴³ Department of Justice, *Freedom of Information Act Guide, May 2004*, “Procedural Requirements”, online: <<http://www.usdoj.gov/oip/procereq.htm#entities>>.

Conclusion

While the *Access to Information Act* sets out a definition of “record”, not all jurisdictions examined do the same. Some jurisdictions (including all Canadian jurisdictions) define what is subject to disclosure by defining the “records” or “documents” to which access applies. Alternatively, some jurisdictions, such as New Zealand, provide access to information, regardless of its form.

B. Exemptions

A Note on Mandatory vs. Discretionary Exemptions

The Act provides that “government information should be available to the public” and as a general principle the requester has a right to obtain information under the control of a government institution. However, the Act acknowledges that certain limited and specific exemptions are necessary, as set out in sections 13-26 of the Act. The majority of exemptions in the Act, as can be seen in the chart at Appendix “B”, are discretionary (“may refuse to disclose”), though there are also a number of mandatory exemptions (“shall refuse to disclose”).

Most jurisdictions have both mandatory and discretionary exemptions. In Canada, New Brunswick is the only jurisdiction that has only discretionary exemptions. Mexico has a general right to information which is subject to exceptions, however the legislation includes a unique provision whereby information can only be classified (exempted) for a maximum of twelve years, as well as requirements that certain types of information cannot be withheld. The United States has nine categories of exemptions, all of which are discretionary. In the United Kingdom, there are “absolute exemptions” where there is no obligation to provide the information, and “qualified exemptions” where a request may be denied subject to a public interest test.

While discretionary exemptions allow for the provision of information in a potentially broader set of circumstances, a mandatory exemption may be helpful in establishing a needed assurance of confidentiality, e.g. where a foreign government wants to be assured that disclosure of their confidential information will not be subject to the discretion of a Canadian government employee. In addition, in many jurisdictions reviewed, exemptions are affected by “public interest override” provisions which require, for example, that the head of an institution disclose information where there is a risk of significant harm to the environment or to the

health and safety of the public, or where disclosure is, for any other reason, clearly in the public interest.⁴⁴

Foreign/Other Governments

Access to Information Act

Section 13 of the Act establishes a mandatory exemption precluding the disclosure of records “obtained in confidence” from other foreign, provincial, municipal and aboriginal governments, as well as international organizations. There is some overlap between s. 13 and s. 15, which allows the government institution to refuse on a discretionary basis disclosure of information that may “reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities”, such as information relating to military and defence operations or diplomatic correspondence. Correspondence received from a foreign state could conceivably fall into both categories, though s. 15 is broader in scope. There is a further distinction in that documents classified under s. 15 must reasonably be expected to cause injury before they can be exempted under the Act, whereas there is no such injury requirement applicable to records falling under s. 13. There does not seem, however, to be provision for instances in which the federal government would be in receipt of confidential information received from state/provincial/municipal governments in foreign jurisdictions.

Other Jurisdictions

Almost all jurisdictions have exemptions relating to protection of governmental relations or information received from foreign or other governments. Manitoba and Saskatchewan have mandatory exemptions similar to that in s. 13 of the ATIA. Most of the other provinces have a discretionary exemption of some kind.

(i) Alberta

Protection of information relating to intergovernmental relations is provided for in s. 21 of Alberta’s *Freedom of Information and Protection of Privacy Act*. This section provides:

⁴⁴ AB FIPPA, s. 32(1); BC FIPPA, s. 25(1); MB FIPPA, s. 18(4) (applies to third party information only); Nfld. AIPPA, s. 31(1); NS FIPPA, s. 31(1); ON FIPPA, s. 23 (only applies to certain sections); P.E.I. FIPPA, s. 30(1); SK FIPPA s. 19(3) (third party information only).

(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:

(i) the Government of Canada or a province or territory of Canada,

(ii) a local government body,

(iii) an aboriginal organization that exercises government functions ...

(iv) the government of a foreign state, or

(v) an international organization of states,

or

(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.

(ii) *New Brunswick*

The discretionary exemption in s. 6(d) applies to information that would violate the confidentiality of information obtained from another government. There are no further exemptions dealing with intergovernmental relations.

(iii) *New Zealand*

Section 6 of the *Official Information Act 1982* provides that:

Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of that information would be likely –

(a) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or

(b) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by –

(i) The government of any other country or any agency of such a government; or

(ii) Any international organisation ...

(iv) *United Kingdom*

The U.K. has exemptions for information that would prejudice relations with other states (s. 27) and within the United Kingdom (s. 28). The exemption for internal relations in the United Kingdom applies to relations between any administrations in the UK, which consist of: the government of the United Kingdom; the Scottish Administration; the Executive Committee of the Northern Ireland Assembly; or the National Assembly for Wales.

Health and Safety

Access to Information Act

Section 17 of the *Access to Information Act* provides for a discretionary exemption relating to health and safety, stating that the head of a government institution may refuse to disclose a record containing information “the disclosure of which could reasonably be expected to threaten the safety of individuals”. The issue, of course, is to define what is included within threats to the safety of individuals. Does it include only an individual’s physical safety? Does it include threats to mental or physical health?

Other Jurisdictions

Exemptions aimed at preventing injury are common in the provincial, territorial, and international jurisdictions examined, and have expanded beyond the general threats to “the safety of individuals” as found under the Act. These exemptions apply to personal safety (including mental health), public safety or, more commonly, both. Ontario and British Columbia have separate exemptions relating to the life and physical safety of those in law enforcement. There are exemptions related to protection of the physical or mental health of the applicant from “immediate and grave harm”, some of which required the opinion a physician, psychologist, or other expert, e.g. in Alberta and Prince Edward Island.⁴⁵ Manitoba’s exemption applies where there is a threat of “serious harm” to the applicant.

(i) *British Columbia*

The health and safety provision in British Columbia’s *Freedom of Information and Protection of Privacy Act* applies to both personal and public safety and

⁴⁵ The expert opinion requirement does not apply where the exemption is to protect the health of someone other than the applicant.

specifically includes mental health. Section 19 contains a discretionary exemption, which provides that disclosure of information, including personal information about the applicant, may be refused if it “could reasonably be expected to (a) threaten anyone else's safety or mental or physical health, or (b) interfere with public safety.” Disclosure of an applicant’s own personal information may be refused under subsection 19(1) if it “could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.”

The Act contains a further exemption relating to law enforcement officials. Subsection 15(1)(f) provides that a request may be refused if it could reasonably be expected to “endanger the life or physical safety of a law enforcement officer or any other person.”

(ii) *Québec*

The health and safety exemption in Québec’s *An Act respecting Access to documents held by public bodies and the Protection of personal information* (s. 28) relates only to information contained in a document kept in the exercise of a duty provided for by law involving the prevention, detection or repression of crime or statutory offences, if its disclosure would likely endanger the safety of a person.⁴⁶

(iii) *Saskatchewan*

Saskatchewan’s health and safety exemption does not differentiate between applicants and others, stating at s. 21 that access can be refused if “the disclosure could threaten the safety or the physical or mental health of an individual”.

(iv) *New Zealand*

The health and safety exemption is similar to the general provision in Saskatchewan’s statute above. The “good reason” exemption provision in section 6 applies where disclosure is likely to “endanger the safety of any person”.

(v) *Mexico*

The wording of Mexico’s health and safety exemption in Article 13 is framed as a mandatory exemption, providing that “[a]ny information that could ... [r]isk the life, health, or safety or any person...shall be deemed as privileged”.

⁴⁶ Section 26 of the QC APBA, which contained further protections of health and safety in relation to the release of industrial secrets or third party information, was repealed in 2006.

(vi) *United Kingdom*

The U.K. also provides that information is exempt, if its disclosure would, or would likely to “endanger the physical or mental health... or safety of any individual.”

“Competitive position” of Government Institutions

Access to Information Act

Section 18 of the *Access to Information Act* contains a discretionary exemption designed to protect the economic interests of the federal government, and in particular for information related to the “competitive position” of the federal government or a government institution. Subsection 18.1 contains provisions specific to information consistently treated as confidential by the Canada Post Corporation, Export Development Canada, the Public Sector Pension Investment Board and VIA Rail Canada Inc.

Other Jurisdictions

Most jurisdictions have some form of exemption relating to the economic interests of the government. Statutes in many Canadian jurisdictions specifically provide, like section 8 of the Act, that information which could prejudice the competitive position of the government may be withheld. Of course, a key issue will be the breadth of this protection (whether carried out by a government institution or an alternative service delivery method) in the context of the principles of access and accountability. Notably, similar exemptions are subject, in many jurisdictions, to the public interest override discussed above and in further detail below.⁴⁷

(i) *Alberta*

Alberta’s *Freedom of Information and Protection of Privacy Act* provides for protection of information where disclosure would be harmful to the “economic interests” of a public body. Section 25(1) provides:

The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:

⁴⁷ See *supra* note 45.

(a) trade secrets of a public body or the Government of Alberta;

(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;

(c) information the disclosure of which could reasonably be expected to

(i) result in financial loss to,

(ii) prejudice the competitive position of, or

(iii) interfere with contractual or other negotiations of,

the Government of Alberta or a public body;

(d) information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or the public body of priority of publication.

(ii) *Québec*

The economic provisions in *An Act respecting Access to documents held by public bodies and the Protection of personal information* are fairly broad in that the public body need not even “confirm the existence of the information”, and that the exemption may be applied if disclosure would “unduly benefit or seriously harm a person” or “have a serious adverse effect on the economic interests of the public body or group of persons under its jurisdiction”. Sections 21 and 22 provide as follows:

21. A public body may refuse to release or to confirm the existence of information if, as a result of its disclosure, borrowings, proposed borrowings, transactions or proposed transactions relating to property, services or works, a proposed tariffing, taxation or imposition of dues, or proposed amendments to taxes or dues would be revealed, where such disclosure would likely

1) unduly benefit or seriously harm a person, or

2) have a serious adverse effect on the economic interests of the public body or group of persons under its jurisdiction.

22. A public body may refuse to release an industrial secret that it owns.

It may also refuse to release other industrial, financial, commercial, scientific or technical information that it owns if its disclosure would likely hamper negotiations in view of a contract, or result in losses for the body or in considerable profit for another person.

A public body established for industrial, commercial or financial management purposes may also refuse to release such information if its disclosure would likely substantially reduce its competitive margin or reveal a loan, investment, debt management or fund management proposal or a loan, investment, debt management or fund management strategy.

(iii) *Mexico*

Article 13 provides that information is exempt if it could “[d]amage the financial, economic or monetary stability of the country.”

(iv) *United Kingdom*

Section 29 provides an exemption for information that would or would be likely to prejudice: “the economic interests of the United Kingdom or of any part of the United Kingdom” or “the financial interests of any administration in the United Kingdom”, as defined by the UK FOIA.

Public-Interest Override

Access to Information Act

The *Access to Information Act* contains a public-interest override only within specific sections, including section 20 addressing confidential third-party information provided to the government. Information protected by section 20(1) may be disclosed under s. 20(6) if such disclosure is in the public interest with regard to public health, public safety, or protection of the environment where the public interest in disclosure clearly outweighs any financial loss/gain or the competitive position of a third party. Personal information exempted under s. 19 may also be disclosed in accordance with a similar override found at s. 8 of the *Privacy Act*.⁴⁸

⁴⁸ R.S.C. 1985, c. P-21.

Other Jurisdictions

A number of the jurisdictions examined provide general provisions to override exemptions in consideration of the public interest, including public health, public safety and protection of the environment.

(i) *British Columbia*

British Columbia's public interest override test is contained in a freestanding section 25 of the *Freedom of Information and Protection of Privacy Act*. Subsection 25(1) is broad and applies to all exemptions:

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.⁴⁹

Before disclosing information under s. 25(1), the head of the relevant public body must, if practicable, notify any third party to whom the information relates, and the B.C. Information and Privacy Commissioner.

(ii) *Nova Scotia*

The 'public interest' override in Nova Scotia's *Freedom of Information and Protection of Privacy Act* is similar to the British Columbia provision, however it provides that the public authority *may* disclose (not *must* disclose, as in B.C.). The circumstances in which the override in section 31 applies are the same as those in British Columbia's provision.

(iii) *Ontario*

Section 23 of Ontario's law provides a general public interest override that applies to the exemptions in sections 13 (advice to government by a public servant or other employee), 15 (relations with other governments), 17 (commercial third party records), 18 (economic and other interests of Ontario), 20 (individual health and safety), 21 (personal privacy) and 21.1 (risk to fish or wildlife species). These

⁴⁹ This is almost identical to the public override in s. 32(1) of the AB FIPPA.

exemptions do “not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.”

In the recent case of *Criminal Lawyers’ Assn. v. Ontario (Ministry of Public Safety and Security)*,⁵⁰ the Ontario Court of Appeal dealt with the use of the exemptions in ss. 14 and 19 that are not subject to the public interest override. The Court held that the override in s. 23 infringes s. 2(b) of the *Canadian Charter of Rights and Freedoms*,⁵¹ because it does not apply the override to the law enforcement and solicitor-client privilege exemptions. This infringement was not justified under s. 1 of the *Charter*.

(iv) *United Kingdom*

As discussed above, the UK FOIA provides for a public interest test to be applied before a discretionary (qualified) exemption is to be used to block access. Based on the premise that disclosure is normally in the public interest, the statute requires that information subject to a qualified exemption is to be disclosed unless:

[I]n all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Conclusion

While numerous other jurisdictions have adopted general public-interest override provisions, it is interesting to note that the Delagrave Report did not conclude that a similar clause was necessary within the context of the *Access to Information Act*. In particular, the report noted that the discretionary exemptions within the Act “already imply a balancing of the public interest in protecting the information, and the public interest in disclosure”, and that other jurisdictions were hesitant to invoke the more expansive public-interest override clauses found within their legislation.⁵²

⁵⁰ *Criminal Lawyers’ Assn. v. Ontario (Ministry of Public Safety and Security)* (2007), 58 C.P.R. (4th) 298 (Ont. C.A.), leave to appeal to S.C.C. granted, [2007] S.C.C.A. No. 382 (Appeal not yet inscribed for hearing).

⁵¹ Section 2(b) guarantees the right to “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

⁵² Delagrave Report, *supra* note 11 at 43.

IV. THE REQUESTING PARTY

A. Limited right of access vs. universal access

Access to Information Act

Access to information in Canada is not universally granted. Section 4 of the *Access to Information Act* provides:

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act,

has a right to and shall, on request, be given access to any record under the control of a government institution.

The right of access has since been extended by the Governor in Council beyond Canadian citizens and permanent residents to all individuals and incorporated entities within the country.

Other Jurisdictions

Almost all jurisdictions examined provide access to all persons, regardless of citizenship or geographic location. This is the case in Mexico, the United States and Great Britain, as well as all Canadian provinces. Canada and New Zealand appear to be the only jurisdictions that limit who may request disclosure.

(i) *Nova Scotia*

Section 5 of Nova Scotia's *Freedom of Information and Protection of Privacy Act* extends the right of access to any "person". No further limitations are placed on who may request information under the Act. This is a common provision across the provinces.

(ii) *New Zealand*

Pursuant to section 12 of the *Official Information Act 1982*, a request may be made by "any person", which is defined as being:

(a) A New Zealand citizen; or

- (b) A permanent resident of New Zealand; or
- (c) A person who is in New Zealand; or
- (d) A body corporate which is incorporated in New Zealand;
or
- (e) A body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand.

(iii) *Mexico*

Mexico's *Federal Law for Transparency and Access to Public Government Information* allows access requests to be made by anyone, regardless of citizenship.

(iv) *United States*

The United States *Freedom of Information Act* applies to any person. "Person" is defined in 5 U.S.C. § 551(2) as including "an individual, partnership, corporation, association, or public or private organization other than an agency".

Conclusion

The *Access to Information Act* appears to be fairly isolated in limiting the right of access on a geographic basis. Of course, the extension of the right of access under the Act may have implications. Would it, for instance, increase the number of requests received and thereby increase the burden on government institutions? Would it place a particular burden on Foreign Affairs, the Department of International Trade, and other institutions likely to receive foreign access requests?

B. Duty to assist the requesting party

Access to Information Act

The *Federal Accountability Act* introduced, through amendments to s. 4(2)(1) of the ATIA, an additional duty on government to provide all reasonable assistance in processing access requests under the Act:

(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

The Commission, in a publication on its website titled *Access to Information and the Duty to Assist*,⁵³ stated that the “duty to assist implies a commitment to a culture of service and underscores the importance of Access to Information as a service to Canadians; duty to assist is more than a process issue and a statutory obligation. It should be viewed as a statutory principle of interpretation.” In particular, heads of institutions should show leadership by:

- placing access to information higher on their list of priorities;
- putting in place a more effective program for administering requests, training personnel and records management;
- monitoring the performance of the program.

Other Jurisdictions

Some form of a duty to assist is found in most jurisdictions examined. However, differences exist in how much a government institution is required to assist or what they have to provide in the form of assistance. Provincial acts, including British Columbia, Prince Edward Island and Nova Scotia, make reference to the provision of “every reasonable effort”. Australia similarly requires “reasonable steps to assist”, but additionally includes timelines for the provision of such assistance.

(i) United Kingdom

In the United Kingdom, the public authority must be proactive in providing assistance and advice and voluntarily publicize certain information. The Information Commissioner monitors and promotes the public authority in meeting this duty. Sections 45 and 46 of the U.K. law require the Secretary of State and Lord Chancellor to issue Codes of Practice which provide guidance to public authorities on 'desirable practice' in discharging their functions under Part I of the Act, and in relation to records management. The codes do not have force of law; however, failure to comply with them may lead to breaches of the Act.

(ii) New Zealand

Section 13 of the *Official Information Act 1982* imposes a duty as follows:

It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who –

⁵³ Online: <http://www.infocom.gc.ca/publications/2008/pdf/duty_to_assist.pdf>.

(a) Wishes to make a request in accordance with section 12 of this Act; or

(b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or

(c) Has not made his request to the appropriate Department or Minister of the Crown or organisation or local authority, —

to make a request in a manner that is in accordance with that section or to direct his request to the appropriate Department or Minister of the Crown or organisation or local authority.

(iii) *United States*

The US legislation requires agencies to make certain information available, namely:

§ 552(a)(2)(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale.

Amendments pursuant to the *Electronic Freedom of Information Act* in 1996 provide that agencies must set up “electronic reading rooms”, through which people may access through the Internet, or otherwise electronically, certain records which

were created after November 1, 1996. Agencies must also publish online indexes of available records.

In response to a request, agencies are to “make the records promptly available to any person ... in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” Agencies must “make reasonable efforts to maintain its records in forms or formats that are reproducible” for such purposes. There is also a duty incumbent on the agency to conduct a reasonable search in its efforts to respond to a request. The FOIA provides that:

In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(iv) Mexico

Mexico has a wide duty to assist and make information accessible. Each department or entity is to have a Liaison Unit which receives and attends to requests. The functions of the liaisons are set out in Article 28, and include assisting interested parties in creating their requests. Where the information sought is held by a different authority, the liaison is to direct the applicant or potential applicant accordingly. There is also a general function in the duties of the liaisons in Article 28 to take “[a]ny other action needed to guarantee and facilitate information flow before the department or entity and interested parties.” The duty to assist is also found in Article 40:

The Liaison Unit will help the petitioners in completing requests for access to information, especially in cases in which the petitioner is illiterate.

Conclusion

The recent inclusion in the Act of a duty to provide all reasonable assistance when processing access requests raises the question of supervision of the exercise of the duty. A number of the provincial jurisdictions, by way of example, provide their respective commissioners with the power to bring any failure to meet the prescribed standards for fulfilling the duty to assist to the attention of the head of the government institution or public body in question.⁵⁴

⁵⁴ AB FIPPA, s. 53; BC FIPPA, s. 42; MB FIPPA, ss. 49 and 50; Nfld. AIPPA, s. 51; ON FIPPA, s. 59; P.E.I. FIPPA, s. 50; QC APBA, ss. 122-124; SK FIPPA, s. 45.

C. Fee waivers & different treatment for non-profit groups, media, academics

Access to Information Act

Fees for access under to the *Access to Information Act* are the same for all requesters. No distinction is made based upon the size of the request, the type of information sought, the identity of the requesting party, or the purpose of the request. The fees charged under section 11 are, for the most part, relatively small with set amounts for reproduction of records. Government institutions may also charge for every 15 minutes of search and preparation time in excess of five hours; this means that, in some cases, fees can be very large. In 2006, by way of example, the Information Commissioner criticized a government institution's request for \$1.6 million to respond to a request that the Commissioner found could be done quickly using existing software.⁵⁵

Pursuant to s. 11(6) of the Act, the head of the government institution may waive (in whole or in part) or refund any fee. The Act does not stipulate a test for granting a waiver.

Other Jurisdictions

As with the *Access to Information Act*, many of the jurisdictions examined do not differentiate between classes of requesters when setting fees for access. In jurisdictions where there is a fee scale, the most common differentiation is between requests for personal vs. commercial uses. Of course, in any system which differentiates based on commercial use, the definition of "commercial" becomes critical.

(i) *Prince Edward Island*

Where an applicant is seeking access to their own personal information in P.E.I., the only charge is for copying. Fees may be waived in whole or in part if the applicant cannot afford payment or for any other reason where appropriate or where releasing the record would be in the public interest. Applicants may request a review of a decision to deny a waiver. The test for granting a waiver is the same as is seen in many other jurisdictions, looking at whether

- (a) the applicant cannot afford the payment or for any other reason it is appropriate to excuse payment; or

⁵⁵ FOI Survey, *supra* note 27 at 29.

(b) the record relates to a matter of public interest, including the environment or public health or safety.⁵⁶

(ii) *British Columbia*

The *Freedom of Information and Protection of Privacy Act* provides that the head of a public body may require an applicant to pay fees for certain services, excluding requests for the applicant's own personal information. Subsection 75(6) allows for the establishment of a fee-scale based on classes of requesters:

The fees that prescribed categories of applicants are required to pay for services under subsection (1) may differ from the fees other applicants are required to pay for them, but may not be greater than the actual costs of the services.

Upon receipt of a written request, fees or portions thereof may be waived, based on the same criteria as listed in the P.E.I. FIPPA above.

(iii) *United Kingdom*

U.K. law does not provide for differential treatment when it comes to setting fees. However, if the information is of sufficiently general interest that multiple people will be requesting it, the information may be publicized instead of requiring people to request it pursuant to the legislation. The Act does not provide for fee waivers, however s. 9 provides that regulations may be made providing that no fee is payable in applicable circumstances.

(iv) *Australia*

In Australia, there is normally no fee for accessing personal information. Where fees are imposed, they may be waived for "any proper reason", which includes hardship to the applicant, or other reasons in the public interest.⁵⁷

(v) *New Zealand*

Officials in New Zealand may impose "reasonable" charges for access requests. The Ministry of Justice has guidelines on its website related to reasonable charges for the release of official information, which have been approved by the Government.⁵⁸ Applicants who feel that a charge is not reasonable may complain to the Ombudsman. According to the Ministry guidelines, the decision to waive or

⁵⁶ P.E.I. FIPPA, s. 76(4).

⁵⁷ FOIA 1982, s. 29(5).

⁵⁸ Ministry of Justice, *Charging Guidelines for Official Information Act 1982 Requests* (18 March 2002), online: <<http://www.justice.govt.nz/pubs/reports/2002/charging-guidelines/index.html>>.

modify fees is at the discretion of the agency subject to the request. Considerations should include:

- potential hardship;
- facilitation of good relations with the public or assistance to the department or organization in its work; and
- “whether remission or reduction of the charge would be in the public interest because it is likely to contribute significantly to public understanding of, or effective participation in, the operations or activities of the government, and the disclosure of the information is not primarily in the commercial interest of the requester.”⁵⁹

(vi) *United States*

While each agency in the United States is able to set its own fees, the *Freedom of Information Act* provides that various groups are to be charged differently. Fees are to be charged based on the following structure:

- *Commercial requesters*: may be required to pay the full cost of searches, reviews and copying;
- *Educational and non-commercial scientific institutions and the news media*: pay only for copying; and
- *All other requesters*: pay fees for search time over two hours and copying.

Pursuant to s. 4(A)(iii), fees are to be waived or reduced if:

[D]isclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Requesters are able to challenge fees. Subsection 4(A)(vii) provides:

In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.

⁵⁹ Section 7.2 of the guide contains guidance on establishing the level of public interest.

(vii) Mexico

Pursuant to Article 27, fees in Mexico are limited, and may not exceed the costs of the materials used in reproducing information and forwarding it. However, Article 52 provides that departments and entities may charge for services when providing “information services with commercial value”.

Conclusion

Some of the jurisdictions examined, including the United States, have a fee structure which distinguishes between requests made for commercial interests and those made primarily to further the public interest or inform individuals. With such a distinction, of course, comes the question of how to define the interests, how to apply such definition, and how the application of the definition is overseen (if at all).

D. Frivolous and vexatious requests***Access to Information Act***

There is no mechanism in the Act for rejecting requests based on the ground that they are “unreasonable”, “frivolous” or “vexatious”. Though this issue has been debated for a number of years, no amendments to allow for the rejection of an access request on these grounds has yet been brought forward.

Other Jurisdictions

Several jurisdictions examined, including some Canadian provinces, have legislative provisions authorizing government institutions to refuse to process requests deemed to be frivolous and/or vexatious.

(i) Alberta

In Alberta, s. 55 of the *Freedom of Information and Protection of Privacy Act* provides:

(1) If the head of a public body asks, the Commissioner may authorize the public body to disregard one or more requests under section 7(1) or 36(1) if

(a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests, or

(b) one or more of the requests are frivolous or vexatious.

(2) The processing of a request under section 7(1) or 36(1) ceases when the head of a public body has made a request under subsection (1) and

(a) if the Commissioner authorizes the head of the public body to disregard the request, does not resume;

(b) if the Commissioner does not authorize the head of the public body to disregard the request, does not resume until the Commissioner advises the head of the public body of the Commissioner's decision.

(ii) *Prince Edward Island*

Similar to the case in Alberta, P.E.I.'s *Freedom of Information and Protection of Privacy Act* provides that the Commissioner may authorize the authority to disregard a request based on the grounds that the request:

(a) would unreasonably interfere with the operations of the public body or amount to an abuse of the right to access, because of the repetitious or systematic nature of the request; or

(b) is frivolous or vexatious.⁶⁰

(iii) *United Kingdom*

The *Freedom of Information Act 2000* allows public authorities to disregard repeated or vexatious requests. Section 14 provides:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

The Department for Constitutional Affairs ("DCA") has published a guide on exemptions, which includes a substantial discussion on what constitutes a vexatious

⁶⁰ P.E.I. FIPPA, s. 52.

request.⁶¹ The Information Commissioner's Office ("ICO") reportedly takes a broad view of what constitutes a vexatious request. A request may be vexatious where the request is not genuinely seeking access to the information for its own sake, but is instead attempting to inconvenience or disrupt the work of the authority or harass individuals in the authority. It may be that there is clearly no serious purpose or value of the information requested, or that the request is manifestly unreasonable.

(iv) *New Zealand*

Subject to subsection 18(h) of the OIA, institutions in New Zealand may refuse a request on the grounds that "the request is frivolous or vexatious or that the information requested is trivial."

(v) *Australia*

The grounds for refusing an access request in Australia are very broad. Institutions may refuse access if the work involved in processing the request would "substantially and unreasonably divert the resources of the Agency from its other operations".

(vi) *Mexico*

Article 48 provides that certain requests do not need to be complied with:

Connection units are not obliged to attend to invasive requests for information: for instance, if they have already delivered information that is substantially identical in response to a previous application by the same person, or if the information is publicly available. In this case they shall indicate to the applicant the place where the information may be found.

Conclusion

The Delagrave Report concluded that there are a "very small" number of frivolous, vexatious or abusive requests under the Act, but recognized that these requests "tend to have a negative impact on the reputation of access within the public service" and "processing them represents a waste of resources that could be better spent responding to legitimate access requests".⁶² Of course, the adoption of a clause allowing for the rejection of a request on this basis would raise the question of the need for a process to ensure that government institutions do not abuse such a power. Government institutions would seemingly want to be provided with

⁶¹ DCA, *Procedural Guidance*, Chapter 3 "The limits of your duty to answer requests", online: <<http://www.foi.gov.uk/guidance/proguide/chap03.htm>>.

⁶² Delagrave Report, *supra* note 11 at 73.

significant guidance as to what would fall within the scope of frivolous, vexatious or abusive requests.

V. ROLE OF COMMISSIONER

A. Mandate of the Information Commissioner

Access to Information Act

The Act contains a general statement on the duties of the Commissioner:

55. (1) The Information Commissioner shall rank as and have all the powers of a deputy head of a department, shall engage exclusively in the duties of the office of Information Commissioner under this or any other Act of Parliament and shall not hold any other office under Her Majesty for reward or engage in any other employment for reward.

There is no clearly defined statutory declaration setting out the Information Commissioner's mandate.⁶³ While the Information Commissioner has an investigatory mandate as outlined in further detail below, the Commissioner also fulfills a number of non-investigatory roles, including education, advisory, mediation, and practice assessment. None of these roles are, however, specifically recognized in the Act.

Other Jurisdictions

Similar to the Privacy Commissioner's mandate as set out under the *Personal Information Protection and Electronic Documents Act*, many provincial access regimes specifically include a mandate. In particular, while most jurisdictions include references to an education and practice assessment mandate, some regimes specifically include a mandate to comment on the implications of proposed

⁶³ In contrast, the mandate of the Privacy Commissioner is more clearly defined under Canada's *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5:

24. The Commissioner shall

- (a) develop and conduct information programs to foster public understanding, and recognition of the purposes, of this Part;
- (b) undertake and publish research that is related to the protection of personal information, including any such research that is requested by the Minister of Industry;
- (c) encourage organizations to develop detailed policies and practices, including organizational codes of practice, to comply with sections 5 to 10; and
- (d) promote, by any means that the Commissioner considers appropriate, the purposes of this Part.

legislative schemes or programs of public bodies on access to information and/or protection of privacy, including section 50(1)(d) of the P.E.I. legislation and section 42(1)(f) of the B.C. legislation.

(i) *Newfoundland & Labrador*

The mandate of the Commissioner under the *Access to Information and Protection of Privacy Act* is set out in s. 51 of the Newfoundland and Labrador law:

In addition to the commissioner's powers and duties respecting reviews, the commissioner may

(a) make recommendations to ensure compliance with this Act and the regulations;

(b) inform the public about this Act;

(c) receive comments from the public about the administration of this Act;

(d) comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies;

...

(f) bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants; and

(g) make recommendations to the head of a public body or the minister responsible for this Act about the administration of this Act.

(ii) *Prince Edward Island*

Section 50 of the P.E.I. FIPPA provides an even broader mandate than that of the Commissioner in Newfoundland & Labrador:

50. (1) In addition to the Commissioner's functions under Part IV, with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

(a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records set out in any other enactment of Prince Edward Island;

(b) make an order described in subsection 66(3) whether or not a review is requested;

(c) inform the public about this Act;

(d) comment on the implications for freedom of information or for protection of personal privacy of proposed legislative schemes or programs of public bodies;

...

(g) bring to the attention of the head of a public body any failure by the public body to assist applicants under section 8; and

(h) give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under this Act.

(iii) *Ontario*

In Ontario, the Information and Privacy Commissioner has the statutory authority to comment on legislative and program proposals that may affect privacy as set out under section 59(a).⁶⁴ Comment may be offered by the Commissioner in a variety of ways, both formally and informally. There is no formal protocol, and the Commissioner may be approached early in the legislative process or after legislation has been drafted. Where the provincial government has not identified the privacy implications of a bill prior to its introduction in the House, the Commissioner may write about any concerns to the Minister, to the responsible program area or, in certain circumstances, may make oral or written submissions to the Legislature or to a Legislative Committee.

(iv) *Mexico*

Article 33 of Mexico's *Federal Law of Transparency and Access to Public Government Information* addresses the mandate of the IFAI:

The Federal Institute of Access to Public Information is a Federal Public Administration agency that is autonomous in operations, budget- and decision-making, and is in charge of encouraging people to use their right to access of information, resolving denied requests for access to information, and protecting personal data in the hands of agencies and entities.

⁶⁴ ON FIPPA, s. 59(a).

The IFAI also has the power to:

- Interpret the law;
- Establish criteria for classification, declassification and safekeeping of privileged and confidential information;
- Assist in setting criteria for cataloguing and preserving documents and organizing archives;
- Monitor agencies and encourage compliance with the legislation;
- Provide guidance to individuals on applications for access;
- Provide technical support to agencies and prepare guidelines for handling and safekeeping personal data;
- Promote and, if applicable, conduct the training of civil servants in the handling of access to information and protection of personal data;
- Inform civil servants and individuals of the benefits of public data handling, as well as their responsibilities;
- Prepare and publish surveys and investigations so as to broaden people's knowledge of the content of the legislation; and
- Work with other obligated persons, federal entities, municipalities on their access-to-information units on the content of the Act.

(v) *United States*

Historically, the United States has not had an information commissioner, or any form of independent oversight of agencies. The 2007 amendments to the FOIA provide for the creation of the Office of Government Information Services, which is to be part of the National Archives and Records Administration. Among other duties such as reviewing agency compliance, the FOIA provides that this new body is to "recommend policy changes to Congress and the President to improve the administration of this section."

Conclusion

The *Access to Information Act* does not expressly provide for the education, advisory, mediation and practice assessment activities undertaken currently, by the Information Commissioner. In addition, the Act does not specifically provide the Information Commissioner with authorization to offer comment on proposed legislative schemes and public programs, though the Commissioner can and has

appeared before Parliamentary committees to comment on legislation in the past. Some jurisdictions studied seemingly believe that enshrining these mandates in access legislation is important.

B. Authority to order disclosure (or lack thereof)

Access to Information Act

The Information Commissioner plays an ombudsman role. While the Commissioner has the power to investigate and recommend under the Act, there is no power to order disclosure of a record.⁶⁵ Of course, the requesting party and/or the Commissioner may initiate a complaint before the Federal Court in order to compel access to records under the Act if the Commissioner's recommendations are not followed.

Other Jurisdictions

In contrast to the Act, many provinces, as well as New Zealand and the United Kingdom, provide the Commissioner with the power to order the disclosure of records. In New Zealand, decisions of the Ombudsman are to be binding, subject to the power of Governor General to prohibit an agency from disclosing the information. However, there are few sanctions for failure to comply.⁶⁶

A number of the jurisdictions which provide for an order-making power, such as Alberta, also set out a time period within which a government institution must respond to an order from the commissioner. Failure to comply within the given period would amount to a breach of the act. In Quebec, a government institution must comply with an order within "a reasonable time". If the Commission considers that appropriate measures have not been taken to implement the order, it may so notify the Government or, if it deems it expedient, submit a special report to the National Assembly or set out the situation in its annual report.

(i) Alberta

Section 72 of Alberta's *Freedom of Information and Protection of Privacy Act* provides as follows:

(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:

⁶⁵ ATIA, s. 37(1).

⁶⁶ FOI Survey, *supra* note 27 at 113.

- (a) require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access;
 - (b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;
 - (c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access.
- (3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:
- (a) require that a duty imposed by this Act or the regulations be performed;
 - (b) confirm or reduce the extension of a time limit under section 14;
 - (c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;
 - (d) confirm a decision not to correct personal information or specify how personal information is to be corrected;
 - (e) require a public body to stop collecting, using or disclosing personal information in contravention of Part 2;
 - (f) require the head of a public body to destroy personal information collected in contravention of this Act.

The Commissioner may also specify any terms or conditions that are to attach to an order. There is a duty to comply with an order not later than 50 days after being given a copy of an order of the Commissioner (s. 74). Section 73 provides that the Commissioner's order is to be final, however a head is not to take steps to comply with an order until the period for bringing an application for judicial review ends.

(ii) *Ontario*

Section 52 of the *Freedom of Information and Protection of Privacy Act* gives the Commissioner the power to require the production of documents and may examine any record in the control of an institution. Upon conclusion of an investigation, the Information and Privacy Commissioner makes an order pursuant to s. 54 on

whether there is to be disclosure and what, if any, conditions are to apply. There is no statutory right of appeal from the Commissioner's decision.

(iii) *Québec*

Under Québec's *An Act respecting Access to documents held by public bodies and the Protection of personal information*, the Commission has broad inquiry powers but inquiries are to be non- adversarial investigations. Upon completion of the inquiry, the Commission's powers are as follows:

128.1. ...[to]

- 1) order the public body to take the necessary measures to ensure the confidentiality of the personal information contained in such a file respecting the adoption of a person;
- 2) indicate the measures that must be taken to ensure the confidentiality of the personal information contained in such a file;
- 3) indicate the special conditions to which the maintenance of such a file may be subject.

The Act provides for the following procedure where a decision is not complied with:

133. If, within a reasonable time after making a recommendation to a public body or after making an order, the Commission considers that appropriate measures have not been taken to implement the recommendation, it may so notify the Government or, if it deems it expedient, submit a special report to the National Assembly or set out the situation in its annual report.

134. The Committee on the National Assembly shall as soon as possible designate the committee which will study the special report.

The designated committee shall study the report within sixty days of its tabling in the National Assembly.

(iv) *New Zealand*

Under New Zealand's *Official Information Act 1982*, where the Ombudsman concludes in favour of the complainant, the Ombudsman is to prepare a report and recommendations for the appropriate body. Section 32 imposes a duty on the body

to comply with the Ombudsman's recommendation unless the Governor General, by Order in Council, otherwise directs.

(v) *United Kingdom*

Upon concluding that a public authority has failed to comply with the Act, the Commissioner may issue an enforcement notice to the public authority, setting out what is required of the public authority:

52.(1) If the Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part I, the Commissioner may serve the authority with a notice (in this Act referred to as "an enforcement notice") requiring the authority to take, within such time as may be specified in the notice, such steps as may be so specified for complying with those requirements.

Where the Commissioner has ordered that information be released pursuant to the public interest test, the decision can be overruled with a certificate signed by a Minister of the Crown. The certificate is evidence that the exception is justified. There is a separate procedure for appeal of such decisions.

Section 54 of the U.K. FOIA provides:

54. – (1) If a public authority has failed to comply with –

- (a) so much of a decision notice as requires steps to be taken,
- (b) an information notice, or
- (c) an enforcement notice,

the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice.

(2) For the purposes of this section, a public authority which, in purported compliance with an information notice –

- (a) makes a statement which it knows to be false in a material respect, or
- (b) recklessly makes a statement which is false in a material respect,

is to be taken to have failed to comply with the notice.

(3) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any

witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.

(4) In this section “the court” means the High Court or, in Scotland, the Court of Session.

(vi) *Mexico*

Mexico’s IFAI has the power to make binding resolutions, which may:

I. Reject the appeal as invalid or dismiss it.

II. Confirm the Committee’s decision, or

III. Revoke or modify the Committee’s decisions and order the agency or entity to allow the applicant access to the requested information or personal data; or to reclassify or modify the information.

...

If the Institute determines during the proceedings of the case that a civil servant might have shirked responsibility, it shall inform the internal control organization of the agency or entity responsible, so that the latter can initiate, if applicable, the corresponding responsibility proceeding.⁶⁷

Article 59 provides that resolutions of the IFAI are final for government bodies; however, they may be appealed by individuals to the federal courts.

(vii) *Australia*

The Ombudsman does not have the authority to order disclosure, however the Administrative Appeals Tribunal does:

58(1) Subject to this section, in proceedings under this Part, the Tribunal has power, in addition to any other power, to review any decision that has been made by an agency or Minister in respect of the request and to decide any matter in relation to the request that, under this Act, could have been or could be decided by an agency or Minister, and any decision of the Tribunal under this section has the same effect as a decision of the agency or Minister.

⁶⁷ *Federal Law for Transparency and Access to Public Government Information*, Article 56.

The Tribunal's powers include the authority to require an agency or Minister to conduct further searches for a requested document. Where the Tribunal determines that a document is exempt from the act, it may not order disclosure; this discretion belongs solely to the agency or Minister responsible.

Conclusion

Our review indicates that the Act's current ombudsman model is increasingly out of step with other jurisdictions which have adapted the quasi-judicial adjudicative model. We note that the Delagrave Report claimed that the Act's ombudsman approach is less likely to lead to a "consistent approach and clear rule making" than a more adjudicative approach.⁶⁸

C. Mediation

Access to Information Act

While efforts to resolve disputes between the relevant government institution and the requester can often be aided through mediation, there is no formal requirement in the Act compelling the Information Commissioner to play a mediation role. The *Response to the Report of the Access to Information Review Task Force: A Special Report to Parliament*,⁶⁹ by way of example, recommended that the Commissioner's role in seeking the informal resolution of complaints through mediation prior to conducting formal, evidentiary proceedings be recognized in the Act. The Information Commissioner's current approach to the mediation process has been described by the Commissioner as adopting a:

"Three Cs" approach: collaboration, cooperation and consultation:

- we aim to be vigorous and responsible in ensuring that the Act is working effectively;
- we will favour alternative means of dispute resolution, such as mediation over formal hearings and the exercise of judicial powers during our investigations.⁷⁰

⁶⁸ Delagrave Report, *supra* note 11 at 112.

⁶⁹ Information Commissioner of Canada, *Response to the Report of the Access to Information Review Task Force: A Special Report to Parliament* (2002).

⁷⁰ Robert Marleau, Information Commissioner of Canada, Speaking Notes for Address to ATIP Community Meeting (20 November 2007).

Other Jurisdictions

In comparison, access legislation in most provinces, as well as the United States, specifically provides for mediation. In New Zealand, while the statute does not specifically provide for mediation, it appears as though mediation is utilized by the Ombudsman in resolving complaints.⁷¹

(i) *Ontario*

Section 51 of Ontario's *Freedom of Information and Protection of Privacy Act* authorizes the Commissioner to assign a mediator to "investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal."

(ii) *British Columbia*

British Columbia's *Freedom of Information and Protection of Privacy Act* allows the Commissioner to retain mediators, and authorize them to settle a matter under review (s. 55).⁷² Section 56 provides that an inquiry may be conducted if the matter is not referred to a mediator or if it is not settled under s. 55.

(iii) *Newfoundland & Labrador*

Section 46 of Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* allows for the informal resolution of complaints:

46. (1) The commissioner may take steps that he or she considers appropriate to resolve a request for review under section 43 or a complaint under section 44 informally to the satisfaction of the parties and in a manner consistent with this Act.

(2) Where the commissioner is unable to informally resolve a request for review within 30 days of the request, the commissioner shall review the decision, act or failure to act of the head of the public body and complete a report under section 48.

(iv) *Québec*

An Act respecting Access to documents held by public bodies and the Protection of personal information has a general informal dispute resolution clause:

⁷¹ Access to Information Review Task Force, *The Information Commissioner Investigative Powers And Procedures*, Report 28, "Comparison with Other Jurisdictions" by Barbara A. McIsaac, Q.C., Report 28 (May 2002), online: <<http://www.atirtf-geai.gc.ca/paper-investigation1exec-e.html#table>>.

⁷² This is the same as s. 63 of the P.E.I. FIPPA.

138.1. On receiving an application, the Commission may direct a person it designates to attempt to bring the parties to an agreement, if it considers it useful and the circumstances of the case allow it.

(v) *Manitoba*

The dispute resolution provision in Manitoba's *Freedom of Information and Protection of Privacy Act* is even broader than that of Québec, providing:

62(2) The Ombudsman may take any steps the Ombudsman considers appropriate to resolve a complaint informally to the satisfaction of the parties and in a manner consistent with the purposes of this Act.

(vi) *United States*

The recent amendments to the US FOIA provide for the Office of Government Information Services to offer mediation services for requestors and administrative agencies "as a non-exclusive alternative to litigation". If mediation does not resolve the dispute, the Office may issue an advisory opinion.

Conclusion

Authorizing the Information Commissioner to assign a mediator to investigate the circumstances of any complaint and to try to effect a settlement is an option to disputes proceeding to the Federal Court, as reflected in our survey of the other jurisdictions. A formal mediation process adds another step (perhaps costs and delays) to the process.

VI. MANDATORY RESPONSE TIMES

Access to Information Act

Under s. 7 of the Act, a government institution which receives a request for information shall give written notice of its decision to the requesting party within 30 days of receiving the request, including providing access to the record if access is being given. Under s. 9, that thirty-day time limit can be extended "for a reasonable period of time" where the request is for a large number of records or necessitates a search through a large number of records, or requires consultations that cannot be completed within the necessary time limit. The Act does not, however, create specific penalties and sanctions when these timelines are exceeded, other than to provide under s. 10(3) that a failure to provide a response under the Act within the specified time period amounts to a deemed refusal to provide the requested record.

Other Jurisdictions

Time limits for agency responses to request ranges from 20 days (e.g. Québec, U.S.) to 30 days (e.g. P.E.I.). In the U.S., in the case of instances of a demonstrated compelling need, the time to respond may be significantly shorter. Mexico provides a very strict requirement compelling the provision of requested information within 10 work days in normal circumstances, though some may question whether this standard can reasonably be met on a regular basis.

In addition, as with the *Access to Information Act*, most examined jurisdictions provide a process through which the government institution may obtain an extension to the initial time limit in certain circumstances. While the Act does not specifically set out limitations on these extensions and refers only to a “reasonable” period of time, other jurisdictions are more stringent in their granting of extensions and their oversight of these extensions. An extension of 30 days or longer may be obtained with the permission of the relevant Commissioner in Alberta, B.C., Manitoba, Nova Scotia and P.E.I.⁷³ In contrast, Newfoundland and Labrador and Saskatchewan only provide for an extension for a maximum of 30 days,⁷⁴ and Québec allows for a maximum extension of 10 days.⁷⁵

(i) *Alberta*

The head of a public body may request an extension of the time to response of up to 30 days pursuant to s. 14 under the following circumstances:

- (a) the applicant does not give enough detail to enable the public body to identify a requested record,
- (b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,
- (c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or
- (d) a third party asks for a review under section 65(2) or 77(3).

Where an inquiry is conducted by the Commissioner, s. 69(6) provides that it is to be completed within 90 days of receiving the request for review, unless the

⁷³ AB FIPPA, s. 14(1); BC FIPPA, s. 10(1); MB FIPPA, s. 15(1); NS FIPPA, s. 9(1); P.E.I. FIPPA, s. 12(1).

⁷⁴ Nfld. AIPPA, s. 16(1) and SK FIPPA, s. 12(1).

⁷⁵ QC APBA, s. 47.

Commissioner gives notice that the period is being extended and provides an anticipated date for the completion of the review.

(ii) *British Columbia*

Subsection 10(1) provides that time period for response may be extended by up to 30 days, upon the request of a head of a public body, in the situations described in s. 14(1)(a)-(c) of the AB FIPPA above.

Pursuant to subsection 56(6), an inquiry is to be completed with 90 days of receiving a request for a review.

(iii) *Manitoba*

Subsection 15(1) provides that time period for response may be extended by up to 30 days, or for a longer period if the Ombudsman agrees, in the situations described in s. 14(1)(a)-(d) of the AB FIPPA above.

A 90-day time limit is imposed upon investigations by the Ombudsman under s. 65, unless the Ombudsman:

(a) notifies the complainant, the head of the public body and any other person who has made representations to the Ombudsman that the Ombudsman is extending that period; and

(b) gives an anticipated date for providing the report.

(iv) *Nova Scotia*

The time limit for responding to an access request may be extended by the head of a public body, pursuant to s. 9(1), for up to 30 days, or longer with the permission of the Review Officer. The circumstances that would justify such an extension are the same as those described in s. 14(1)(a)-(c) of the AB FIPPA above.

(v) *Prince Edward Island*

Section 9 provides that the head of a public body must respond “without undue delay” and not later than 30 days after receipt of a request. The time limit may be extended for up to 30 days (or longer with permission of the Commissioner) where: the application does not have sufficient detail to enable the record to be identified; there is a large number of records requested and compliance with the time limit would “unreasonably interfere with the operations of the public body”, more time is needed for consultation with a third party of another public body, or a

third party has asked for a review.⁷⁶ Under s. 13, a request may be transferred to another public body within 15 days, in which case the 30-day time limit is reset for the new body. Subsection 9(1) provides that the failure to respond within 30 days, subject to the above exceptions, is deemed to be a refusal of the request.

The 20-day period may be extended by to 10 days, upon giving notice to the applicant, where a response to the request cannot be provided within 20 days “without impeding the normal course of operations of the public body”. A failure to respond within the time limit is deemed to be a refusal.

(vi) *Newfoundland & Labrador*

Section 16 allows for an extension for a maximum of 30 days where:

- (a) the applicant does not give sufficient details to enable the public body to identify the requested record;
- (b) a large number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body; or
- (c) notice is given to a third party under section 28.

(vii) *Saskatchewan*

Section 12(1) provides that the time period for a response may be extended “for a reasonable period not exceeding 30 days”:

- (a) where:
 - (i) the application is for access to a large number of records or necessitates a search through a large number of records; or
 - (ii) there is a large number of requests;

and completing the work within the original period would unreasonably interfere with the operations of the government institution;

- (b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

⁷⁶ P.E.I. FIPPA, s. 12(1).

(c) where a third party notice is required to be given pursuant to subsection 34(1).

(viii) *Québec*

Pursuant to s. 47 of *An Act respecting Access to documents held by public bodies and the Protection of personal information*, the head of the authority has twenty days to grant access to the relevant documents or to inform the applicant: of the special conditions, if any, to which access is subject; that the agency is not in possession of the requested document, that full or partial access to the document cannot be granted to him, that the information cannot be identified or is not covered by the law, or will not be disclosed for any other reason.

(ix) *United Kingdom*

A response is to be furnished within 20 days working days of the receipt of a request. However, where a notice is given to the applicant requiring the payment of fees, the time between the notice being given to the applicant and the fee being paid does not count towards the 20-day time limit.

(x) *New Zealand*

Section 15 provides that a decision is to be made on the request and the applicant is to be informed of the decision within 20 days. This period may be extended “for a reasonable period of time having regard to the circumstances” where there is a large request or consultation is required.

(xi) *United States*

Pursuant to recent amendments, agencies that have not responded to a request during the specified time period (20 days) are limited with regards to fees. They may not charge search fees (or duplication fees for the news media, educational or scientific institutions etc.) unless there are unusual or exceptional circumstances for the delay (as defined in the FOIA).⁷⁷

The FOIA includes a provision allowing applicants who are able to demonstrate a “compelling need” to request expedited processing. Compelling need exists where “a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual” or there exists “urgency to inform the public concerning actual or alleged Federal Government activity.” Failure to reply to a

⁷⁷ This provision is not in force until one year from date of the enactment of the *OPEN Government Act*.

request for expedited processing in a timely manner (within 10 days) is subject to judicial review.

(xii) *Australia*

Section 14 provides that the Minister must notify the applicant that the request has been received within 14 days, and must “take all reasonable steps” to notify the applicant of a decision as soon as practicable and not later than 30 days after receipt of the request. The period for response may be extended by 30 days.

(xiii) *Mexico*

Requested information is to be delivered within 10 workdays of a request. The liaison has 5 days to inform the requester that the information is not available and to advise, if applicable, where it can be accessed. If more specific information is required to enable the liaison to comply with the request, they have five days to inform the requester of this, who then has 30 days to provide the details. The time limit may be extended by 20 working days once.

Conclusion

The thirty-day time period under the Act is longer than the period provided in other jurisdictions, though “30 days” may in fact be quite close to 20 work days or similar such provisions. In addition, the Act provides little oversight of grants of extensions of time compared to other jurisdictions. Further, the Act does not, unlike other jurisdictions, impose any time limits on the length of time the Commissioner has to conduct an investigation.

VII. REVIEW/RECOURSE TO THE COURTS

A. Requesting Party

Access to Information Act

As stated above, the Act creates a two-tier process whereby a requesting party who is denied access to a record may first complain to the Information Commissioner, who acts in an ombudsman role and has no ability to compel disclosure. If the matter is not resolved with the assistance of the Information Commissioner, the requesting party may bring an application for judicial review before the Federal Court.⁷⁸

⁷⁸ ATIA, s. 41.

Other Jurisdictions

A similar model to the Federal model is employed in Manitoba, providing that dissatisfied applicants may appeal to the courts following the investigation of a complaint by the Commissioner. In Québec, appeals to the courts may only concern questions of law. In British Columbia, Ontario, Alberta and Prince Edward Island, where decisions of the commissioners are binding, the legislation does not allow for appeal to the courts. Finally, in provinces where complaints may be brought directly to the courts, such as New Brunswick and Newfoundland, there is generally no right to appeal the judge's decision. Internationally, the legislation in the United States provides for internal appeal to the body that made the original decision and then for subsequent appeal to the courts, while decisions in Australia and the U.K. may be appealed to specialized tribunals.

(i) *Manitoba*

Where following a refusal to grant information, an applicant has made a complaint to the Ombudsman and upon completion of the Ombudsman's report, a refusal may be appealed to the court, pursuant to s. 67 of the *Freedom of Information and Protection of Privacy Act*. Appeals are heard as new matters and the courts may hear evidence by affidavit. Decisions of the court are final and binding and not subject to appeal.

(ii) *Québec*

According to s. 146, all decisions of the Commission on questions of fact are final. Questions of law may be appealed to the courts as follows:

147. A person directly interested may bring an appeal from the final decision of the Commission before a judge of the Court of Québec on a question of law or jurisdiction, including an order of the Commission issued following an investigation, or, with leave of a judge of that Court, from an interlocutory decision that will not be remedied by the final decision.

Section 154 provides that the decision of the judge of the Court of Québec is final.

(iii) *Prince Edward Island*

Section 67 provides that an order made by the Commissioner is final, however an application for judicial review may be brought under the *Judicial Review Act*.⁷⁹

⁷⁹ R.S.P.E.I. Cap. J-3.

(iv) New Brunswick

Section 7 allows an unsatisfied applicant to bring a complaint either to the Ombudsman or a judge of the Court of Queen's Bench of New Brunswick. Where the applicant brings the matter directly to the court, the matter cannot be appealed further. Where the initial review is conducted by the Ombudsman and a recommendation has been made to the appropriate Minister, the applicant may appeal the Minister's decision. Section 12 places the onus on the Minister to show that the information request was rightly rejected. The Act also allows for costs to be awarded to the applicant.⁸⁰

(v) Newfoundland & Labrador

As is the case in New Brunswick, appeals may be brought to the courts where the initial complaint was made to the Commissioner. Where the head of the public body does not intend to comply with the Commissioner's recommendation for disclosure, notice is sent to the applicant, upon receipt of which the applicant may appeal to the Trial Division.⁸¹

(vi) Nova Scotia

An unsatisfied applicant may appeal the decision of a head of a public body directly to the Supreme Court of Nova Scotia where no third party has been notified pursuant to s. 22 or any third party so notified consents to an appeal. Section 22 provides for notice to be given to a third party where the record requested may contain personal information or confidential information of that third party.

Where the initial review was conducted by a Reviewing Officer, there is a right of appeal to the Supreme Court.⁸²

(vii) Alberta

Section 77 provides that the applicant or a third party who has been notified may request that an adjudicator review any decision, act or failure to act of the Commissioner, however s. 75 precludes the adjudicator from reviewing an order of the Commissioner made under the Act.

(viii) Australia

Decisions of the Administrative Appeals Tribunal may be appealed to the courts on questions of law. Where a complaint is brought on the basis of a certificate

⁸⁰ NB RTIA, s. 13.

⁸¹ Nfld. AIPPA, s. 63(1) and (2).

⁸² NS FIPPA, s. 41(1).

that has been issued by a Minister, the Tribunal's review will be limited to consideration of whether there were reasonable grounds for the Minister's claim that the information was exempt under the Act (see "Cabinet Confidences" above).

(ix) *United Kingdom*

As discussed above under the heading "Oversight of the Information Commissioner", decisions of the Commissioner may be appealed to the Information Tribunal, whose decisions in turn may be appealed to the courts.

(x) *United States*

Following decisions on appeal to the applicable agency, complaints may be made to the courts. The courts may "enjoin the agency from withholding agency records" and "order the production of any agency records improperly withheld from the complainant." The matter is determined de novo by the court.

Conclusion

In the two-tiered model established under the *Access to Information Act*, a requesting party who is not satisfied after the Commissioner's investigation may then bring an application for judicial review before the Federal Court. Of course, any proceeding before the Federal Court carries with it substantial legal costs, and it can take a significant period of time to obtain a decision. The possibility of an appeal to the Federal Court of Appeal, followed by an application for leave to appeal to the Supreme Court of Canada, can delay the release of information for years longer. Some jurisdictions studied provide for binding decisions by a commissioner or specialized tribunal without a right of review by the courts potentially limit costs and delays. Having said that, the involvement of the Federal Court has established a significant body of jurisprudence to guide all stakeholders as regards the application of the Act.

B. Role of the Commissioner Before the Courts

Access to Information Act

While the Information Commissioner acts in an ombudsman role and can only recommend the disclosure of a record under the Act, the Commissioner can apply to the Federal Court of his own right for a review of any refusal to disclose a record requested under the Act in respect of which an investigation has been carried out by the Information Commissioner (if the Commissioner has the consent of the person who requested access to the record), appear on behalf of any person who has applied for a review, or, with leave of the Court, appear as a party to any review applied for under section 41 or 44 of the Act.

Other Jurisdictions

The Ombudsman in Manitoba may apply to the courts for review. The Commissioner may not be party to an appeal in Nova Scotia, Saskatchewan, Northwest Territories,⁸³ Nunavut⁸⁴ and the Yukon Territory.⁸⁵ In provincial statutes that provide that decisions of the Commissioner are final, such as in Ontario, participation of the Commissioner before the courts is not normally addressed.

(i) *Manitoba*

Section 68 allows the Ombudsman to appeal a decision to the court after obtaining the consent of the person who has the right of appeal, or the Ombudsman may intervene as a party to an appeal. However, the *Freedom of Information and Protection of Privacy Act* includes the proviso that the Ombudsman may only do so if “the Ombudsman is of the opinion that the decision raises a significant issue of statutory interpretation or that an appeal is otherwise clearly in the public interest.”

(ii) *Newfoundland & Labrador*

With the consent of the applicant or an involved third party, the Commissioner may appeal the decision of a head of the public body to the Trial Division. The Commissioner may also intervene as a party to an appeal.

(iii) *Nova Scotia*

Section 41(5) provides that the Review Officer (designated by Cabinet) is not to be a party to an appeal. The Minister of Justice however, who must be notified of the appeal, may become a party.

(iv) *United Kingdom*

As discussed above, the Commissioner is able to make decisions that are binding on the public authority. Where the public authority does not act on the decision notice, the Commissioner may make an application to the High Court, who may deal with the public authority as if it was in contempt of court.⁸⁶

(v) *United States*

There is no role for a commissioner in review before the courts; however the statute provides that the courts “shall accord substantial weight to an affidavit of an

⁸³ *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20.

⁸⁴ *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20 (as amended by S.Nu. 2003, c. 31, s. 2).

⁸⁵ *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1.

⁸⁶ UK FOIA, s. 54.

agency concerning the agency's determination as to technical feasibility" and "reproducibility".

Conclusion

While the Commissioner plays an ombudsman role during the complaint and investigation process set out in sections 30-37 of the Act, that role potentially shifts into that of an adversarial party before the Federal Court. In Manitoba, by way of comparison, the Ombudsman may only proceed before the courts when of the view that the decision raises significant issues of statutory interpretation or in situations clearly in the public interest. While still playing an adversarial role in such a process, it appears to be more limited in scope.

APPENDIX "A"

(i) *New Brunswick*

The *Right to Information Act* provides access to information relating to the public business of the Province. Pursuant to s. 2, information may be requested from any department, which is defined in s. 1 as:

- (a) any department of the Government of the Province;
- (b) any Crown Agency or Crown Corporation;
- (b.1) any community board, school board or regional health authority;
- (c) any other branch of the public service;
- (d) any body or office, not being part of the public service, the operation of which is effected through money appropriated for the purpose and paid out of the Consolidated Fund,

as set out in the regulations.

(ii) *Prince Edward Island*

Section 6 of P.E.I.'s *Freedom of Information and Protection of Privacy Act* provides access to "any record in the custody or under the control of a public body". A "public body" is defined as:

- (i) a department, branch or office of the Government of Prince Edward Island,
- (ii) an agency, board, commission, corporation, office or other body designated as a public body in the regulations,
- (iii) the Executive Council Office, and
- (iv) the office of an officer of the Legislative Assembly.

The definition of public body also provides some specifics of what is not covered, namely the offices of the Speaker of the Legislative Assembly and Members of the Legislative Assembly and the courts.

(iii) *Newfoundland & Labrador*

Newfoundland's *Access to Information and Protection of Privacy Act* applies to all records in the custody of or under the control of a public body, which is defined as:

- (i) a department created under the *Executive Council Act* , or a branch of the executive government of the province,
- (ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown,
- (iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister,
- (iv) a local public body, and
- (v) the House of Assembly and statutory offices, as defined in the *House of Assembly Accountability, Integrity and Administration Act*,

and includes a body designated for this purpose in the regulations made under section 73, but does not include,

- (vi) the constituency office of a member of the House of Assembly wherever located,
- (vii) the Trial Division, the Court of Appeal or the Provincial Court , or
- (viii) a body listed in the Schedule.

(iv) *Nova Scotia*

“Public body” is defined in s. 3(j) of the *Freedom of Information and Protection of Privacy Act* as:

- (i) a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which
 - (A) are appointed by order of the Governor in Council, or
 - (B) if not so appointed, in the discharge of their duties are public officers or servants of the Crown,

and includes, for greater certainty, each body referred to in the Schedule to this Act but does not include the Office of the Legislative Counsel,

- (ii) the Public Archives of Nova Scotia,
- (iii) a body designated as a public body pursuant to clause (f) of subsection (1) of Section 49, or
- (iv) a local public body.

A “local public body” is a hospital, university, school board, Collège de l’Acadie established by the Community Colleges Act, or the Nova Scotia Community College.

Section 49(1)(f) allows the Governor in Council to make regulations designating the following as a public body:

- (i) any agency, association, board, commission, corporation, office, society or other body
 - (A) any member of which is appointed by the Governor in Council or a minister,
 - (B) a controlling interest in the share capital of which is owned by Her Majesty in right of the Province or any of its agencies, or
 - (C) that performs functions pursuant to an enactment.

(v) *Manitoba*

Manitoba’s *Freedom of Information and Protection of Privacy Act* defines “public body” as:

- (a) a department,
- (b) a government agency,
- (c) the Executive Council Office,
- (d) the office of a minister, and
- (e) a local public body,

but does not include

(f) the office of a Member of the Legislative Assembly who is not a minister,

(g) the office of an officer of the Legislative Assembly, or

(h) The Court of Appeal, the Court of Queen's Bench or the Provincial Court.

A "local public body" is an educational body; a health care body; or a local government body.

(vi) *Ontario*

The *Freedom of Information and Protection of Privacy Act* applies to records in the custody or under the control of an institution, which is defined as:

(0.a) the Assembly,

(a) a ministry of the Government of Ontario,

(a.1) a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*, and

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations; ("institution").

The application of the Act to the Assembly is quite limited, as discussed below.

(vii) *Saskatchewan*

Government institution is defined in s. 2 of Saskatchewan's *Freedom of Information and Protection of Privacy Act* as:

(i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan; or

(ii) any prescribed board, commission, Crown corporation or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part:

(A) by the Lieutenant Governor in Council;

(B) by a member of the Executive Council; or

(C) in the case of:

(I) a board, commission or other body, by a Crown corporation; or

(II) a Crown corporation, by another Crown corporation.

The following are specifically excluded from the definition of “government institution”:

(a) a corporation the share capital of which is owned in whole or in part by a person other than the Government of Saskatchewan or an agency of it;

(b) the Legislative Assembly Service or offices of members of the Assembly or members of the Executive Council; or

(c) the Court of Appeal, Her Majesty’s Court of Queen’s Bench for Saskatchewan or the Provincial Court of Saskatchewan.

(viii) *Québec*

Section 3 of *An Act respecting Access to documents held by public bodies and the Protection of personal information* defines “public bodies” as: “The Government, the Conseil exécutif, the Conseil du Trésor, the government departments and agencies, municipal and school bodies and the health services and social services institutions” and “the Lieutenant-Governor, the National Assembly, agencies whose members are appointed by the Assembly and every person designated by the Assembly to an office under its jurisdiction, together with the personnel under its supervision.” The courts are not public bodies for the purposes of the Act.

(ix) *British Columbia*

British Columbia’s *Freedom of Information and Protection of Privacy Act* applies to public bodies, defined as:

(a) a ministry of the government of British Columbia,

(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, or

(c) a local public body

but does not include

(d) the office of a person who is a member or officer of the Legislative Assembly, or

(e) the Court of Appeal, Supreme Court or Provincial Court.

A local public body is: a local government body; a health care body; a social services body; an educational body; or a governing body of a profession or occupation listed in Schedule 3.

(x) *Alberta*

Alberta's *Freedom of Information and Protection of Privacy Act* applies to public bodies, which are defined as:

(i) a department, branch or office of the Government of Alberta,

(ii) an agency, board, commission, corporation, office or other body designated as a public body in the regulations,

(iii) the Executive Council Office,

(iv) the office of a member of the Executive Council,

(v) the Legislative Assembly Office,

(vi) the office of the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner or the Information and Privacy Commissioner, or

(vii) a local public body,

but does not include

(viii) the office of the Speaker of the Legislative Assembly and the office of a Member of the Legislative Assembly, or

(ix) the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta.

A "local public body" is an educational body; a health care body; or a local government body.

APPENDIX "B"

Mandatory Exemptions		Discretionary Exemptions	
s. 13	Information obtained in confidence from a government of a foreign state, etc.	s. 14	Federal-provincial affairs
s. 16(3)	Policing services performed by the RCMP for provinces or municipalities	s. 15	International affairs and defence
s. 19	Personal information	s. 16(1) and (2)	Law enforcement, investigation and security
s. 20	Third party information	s. 21	Advice or recommendations, etc.
s. 24	Statutory prohibitions against disclosure as set out in Schedule II	s. 22	Testing procedures, test and audits
		s. 23	Solicitor-client privilege
		s. 26	Refusal of access where information to be published