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LEGISLATIVE SUMMARY

BILL C-58:
AN ACT TO AMEND THE ACCESS TO INFORMATION ACT AND THE PRIVACY ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-58
(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-58: AN ACT TO AMEND THE ACCESS TO INFORMATION ACT AND THE PRIVACY ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts,[1] was introduced at first reading in the House of Commons on 19 June 2017. It passed second reading and was referred to the House of Commons Standing Committee on Access to Information, Privacy and Ethics (the Committee) on 27 September 2017.

After studying the bill, the Committee reported back to the House of Commons on 20 November 2017 setting out its proposed legislative amendments (which are addressed in this Legislative Summary).[2]

The bill as amended by the Committee received third reading in the House of Commons on 6 December 2017 and first reading in the Senate on 7 December 2017.

The bill received second reading in the Senate on 6 June 2018 and was referred to the Standing Senate Committee on Legal and Constitutional Affairs (the Senate Committee) for study on that same date. **The Senate Committee presented its report to the Senate on 1 May 2019, which contained 20 amendments and eight observations.[3] On 7 May 2019, the Senate passed the bill at third reading without further amendment and sent a message to the House of Commons the same day. The House of Commons considered the Senate amendments on 13 and 17 June 2019. On 18 June 2019, the House passed a motion concerning the Senate amendments, approving 18 (in whole or in part), rejecting two and adding others.[4] As the Senate did not insist on its amendments, the bill received Royal Assent on 21 June 2019.**

As stated in its summary, Bill C-58 amends the *Access to Information Act*[5] (ATIA) to, among other things:

- set out the reasons for which the head of a government institution may decline to act on a request for access to a record, including because it is vexatious or made in bad faith, and give the requester the right to make a complaint to the information commissioner if their request is declined;
- authorize the information commissioner to refuse to investigate a complaint that is, in the commissioner's opinion, trivial, frivolous or vexatious or made in bad faith;
- authorize the information commissioner to make orders in certain circumstances;

- clarify the powers of the information commissioner and the privacy commissioner to examine documents containing information that is subject to solicitor–client privilege or the professional secrecy of advocates and notaries or to litigation privilege in the course of their investigations;
- create a new Part providing for the proactive publication of certain information by the Senate, the House of Commons, parliamentary entities, ministers' offices, government institutions and institutions that support superior courts;
- require the designated minister to undertake a review of the ATIA within one year after the day on which the bill receives royal assent and every five years afterwards;
- authorize government institutions to provide to other government institutions services related to requests for access to records; and
- expand the Governor in Council's power to amend Schedule I of the ATIA (which lists the government institutions that are subject to the Act) and retroactively validate amendments to that schedule.

Bill C-58 also amends the *Privacy Act*[6] to:

- create a new exception to the definition of "personal information" with respect to individuals who are ministerial advisers or members of a ministerial staff;
- authorize government institutions to provide to other government institutions services related to requests for personal information; and
- expand the Governor in Council's power to amend the schedule to the *Privacy Act* (which lists the government institutions that are subject to the Act) and retroactively validate amendments to that schedule.

Bill C-58 also makes consequential amendments to the *Canada Evidence Act* and the *Personal Information Protection and Electronic Documents Act*.

1.1 THE *ACCESS TO INFORMATION ACT*

The ATIA, which came into force in 1983, has quasi-constitutional status.[7]

Its purpose is to "enhance the accountability and transparency of federal institutions."[8] The Supreme Court of Canada has ruled that the overarching purpose of the ATIA is to "facilitate democracy" in two related ways:

> It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.[9]

Three principles are enshrined in the purpose of the ATIA:

- The public has a right to access records under the control of a government institution.
- Necessary exceptions to the right of access should be limited and specific.
- Decisions on the disclosure of government information should be reviewed independently of government.

In this way, the ATIA gives Canadian citizens and individuals who are permanent residents within the meaning of the *Immigration and Refugee Protection Act* the right to access records under the control of government institutions.[10] It sets out exemptions and exclusions to this right of access.[11] It also establishes the position of information commissioner of Canada – an officer of Parliament, who conducts investigations into complaints concerning the right of access.[12]

In 2006, the ATIA was amended by the *Federal Accountability Act*.[13] In particular, it amended the definition of government institution in the ATIA to expand its scope to approximately 70 institutions, including officers of Parliament and Crown corporations and their wholly owned subsidiaries.[14] The *Federal Accountability Act* also amended the ATIA to give federal institutions the duty to assist requesters.[15]

No substantial changes have been made to the ATIA since the 2006 amendments. In March 2015, the Information Commissioner tabled a special report, *Striking the Right Balance for Transparency – Recommendations to modernize the* Access to Information Act, in which she pointed out that the ATIA "remains largely in its original form," despite the fact that "[o]ver the Act's three decades of existence, technology, the administration of government and Canadian society have been transformed in many regards."[16] The Information Commissioner therefore made 85 recommendations for modernizing the ATIA. Her recommendations focused on

- extending coverage to all branches of government;
- improving procedures for making access requests;
- setting tighter timelines;
- maximizing disclosure;
- strengthening oversight;
- disclosing more information proactively;
- adding consequences for non-compliance; and
- ensuring periodic review of the Act.[17]

1.2 *ACCESS TO INFORMATION ACT* REFORM

1.2.1 Reform Announced by the Government

In November 2015, Prime Minister Justin Trudeau released the mandate letter for the then-president of the Treasury Board, the Honourable Scott Brison. The letter made reform of the federal access to information regime a priority by directing the Treasury Board president to

> *[w]ork with the Minister of Justice to enhance the openness of government, including leading a review of the Access to Information Act to ensure that Canadians have easier access to their own personal information, that the Information Commissioner is empowered to order government information to be released and that the Act applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts.*[18] [IN ITALICS IN ORIGINAL]

On 31 March 2016, Minister Brison announced public consultations on "the development of a new strategy on Open Government" and "the best way to both improve and strengthen Canada's access-to-information framework."[19]

He also announced that moving forward on the government's commitment to strengthen and improve the access to information regime would be a two-phase process.

The first phase would involve implementing the government's election platform commitments, as well as other improvements to be identified through consultations and the Committee's recommendations. Minister Brison mentioned the following commitments in particular:

- giving the Information Commissioner the power to order government information to be released;
- ensuring the Act applies appropriately to the Prime Minister's and Ministers' Offices; and
- it also applies to administrative institutions that support Parliament and the courts.[20]

The first phase would result in the tabling of legislation.[21]

During his appearance before the Committee on 5 May 2016 as part of the Committee's study of the ATIA, Minister Brison said that, in addition to the above commitments, the first phase of the access to information reform would include the following:

- implementing a mandatory five-year review of the ATIA starting in the current government's mandate; and

- improving response times for access to information requests by addressing the problem of frivolous and vexatious requests to ensure that the purpose of the ATIA is respected.[22]

The second phase of strengthening the access to information regime would be the first five-year review of the ATIA in 2018.[23]

Following his appearance before the Committee, Minister Brison released the *Interim Directive on the Administration of the* Access to Information Act.[24] This directive eliminates the fees set out in the ATIA and the *Access to Information Regulations* for access to information requests, except for the $5 application fee.[25] It also directs federal officials to "release information in user-friendly formats (e.g., spreadsheets), whenever possible."[26]

Lastly, in September 2016, Minister Brison announced that a bill to implement the first phase of the reform would be introduced in winter 2017.[27] As mentioned above, Bill C-58 was introduced in the House of Commons on 19 June 2017.

On 28 September 2017, the then-information commissioner, Suzanne Legault, tabled a special report in Parliament entitled *Failing to Strike the Right Balance for Transparency – Recommendations to Improve Bill C-58: An Act to amend the* Access to Information Act *and the* Privacy Act *and to make consequential amendments to other acts*.[28] In this report, she stated that the bill "fails to deliver" on the government's promises and that, rather than advancing access to information rights, if adopted, Bill C-58 "would instead result in a regression of existing rights."[29] The special report and selected recommendations are quoted in the second part of this Legislative Summary under "Description and Analysis."

1.2.2 Government Consultations

As announced, on 1 May 2016, the government launched online public consultations on its proposals to improve the ATIA. The consultations ended on 30 June 2016 and a report presenting the main findings was released. According to the report,

> [t]he majority of input received supported the Government of Canada's proposals. Some comments recommended the Government go further than its proposals in certain areas; in particular, on fees, several respondents suggested eliminating fees altogether or supported the recommendations of the House of Commons Standing Committee to abolish the $5 application fee but consider fees for voluminous requests. On other proposals, respondents noted cautions: for example, with respect to the proposal to give government institutions and the Information Commissioner authority to decline to process requests or complaints that are frivolous and vexatious, some respondents voiced reservations that without appropriate oversight, this authority could be abused.[30]

1.2.3 Report by the House of Commons Standing Committee on Access to Information, Privacy and Ethics

In February 2016, the Committee began a study on modernizing the ATIA. The Committee presented its report on this study to the House of Commons in June 2016.[31] The Committee's report contains 32 recommendations, some of which pertain to the first phase of the reform of the access to information regime, while others pertain to the second phase. The recommendations concerning the first phase of the reform focus on the following:

- extending the application of the ATIA;
- strengthening Canadians' right of access, particularly by introducing a legal duty to document and by eliminating the $5 application fee;
- improving compliance with access to information timelines so that Canadians have quick and timely access to information;
- maximizing disclosure, particularly by including a public interest override in the ATIA and replacing the exemption and exclusion scheme with an exemption scheme;
- strengthening oversight of the right of access to information, particularly by adopting an order-making model;
- encouraging transparency and open government initiatives, in particular, by including an obligation in the ATIA to proactively publish information that is clearly of public interest; and
- ensuring that the ATIA is up to date, that it responds to technological needs and that Canadians can easily access information, particularly through the introduction of a five-year mandatory parliamentary review of the ATIA.

The government tabled its response to the Committee's report in the House of Commons in October 2016.[32]

2 DESCRIPTION AND ANALYSIS

Bill C-58 contains 63 clauses. The description that follows focuses on certain aspects of the bill, and does not review all of its provisions. Below is an overview:

- Clauses 1 to 46 amend the ATIA.
  - Clauses 39 to 41 make some terminology changes to the ATIA.
  - Clauses 42 to 46 contain transitional provisions concerning the ATIA.
- Clauses 47 to 57 amend the *Privacy Act*.
- Clause 58 validates orders relating to the ATIA.

- Clause 59 validates orders relating to the *Privacy Act*.
- Clause 60 contains a consequential amendment to the *Canada Evidence Act*.
- Clause 61 contains a consequential amendment to the *Personal Information Protection and Electronic Documents Act*.
- Clause 62 contains a coordinating amendment.
- Clause 63 provides for the coming into force of the bill's provisions.

2.1 AMENDMENTS TO THE *ACCESS TO INFORMATION ACT*

2.1.1 Long Title

Clause 1 incorporates the concept of publishing information proactively – the central focus of the bill – into the long title of the ATIA by adding "and to provide for the proactive publication of certain information" to the existing title: "An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada."

2.1.2 Purpose

Clause 2 amends section 2, the purpose of the ATIA, by inserting the following new first paragraph:

> The purpose of this Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.

The purpose of the ATIA, as currently set out in section 2(1), is moved down to section 2(2)(a) and now pertains to new Part 1 of the ATIA, relating to the right of access to information in records under the control of a government institution (new sections 5 to 71 of the ATIA). According to Commissioner Legault, "The text of the old purpose clause is maintained as a secondary purpose, to be used in furtherance of this new, primary purpose."[33]

New section 2(2)(b) provides that new Part 2 of the ATIA, which includes new sections 71.01 to 91, "sets out requirements for the proactive publication of information."

Section 2(2), currently in force, becomes new section 2(3), with the word "also" added at the start of the section. This section identifies another purpose of the ATIA: complementary procedures.

In her special report, Commissioner Legault argued that amending the purpose clause of the ATIA "could lead to a more restrictive interpretation of the entire Act, and could result in less disclosure of information to requesters."[34]

She pointed out that, although the statement regarding the bill's consistency with the *Canadian Charter of Rights and Freedoms* (the Charter), tabled in the House of Commons by the Minister of Justice on 20 September 2017,[35] deals with how the bill's proactive publication regime could impact Charter rights, it does not address how the amendments to the purpose clause will impact the right of access and section 2(b) of the Charter (which guarantees freedom of expression).[36]

Commissioner Legault concluded that the proposed change to the ATIA's purpose clause "is unnecessary and could affect the interpretation of the Act as a whole."[37] **The bill was not amended in this regard.**

2.1.3 Definition of "Personal Information"

Clause 3(2) adds a definition of "personal information" to section 3 of the ATIA, referring to the definition set out in section 3 of the *Privacy Act*.[38] Consequently, clause 9 amends section 19 by removing the reference to this definition.

2.1.4 New Part 1: Access to Government Records

2.1.4.1 Clause 5 ("The End of Info Source")

In the first reading version of the bill, clause 5 amended section 5 of the ATIA to require the head of each government institution to cause to be published the title and address of the appropriate officer or employee for the government institution to whom requests for access to records should be sent.

Section 5 of the ATIA requires the designated minister to cause to be published, at least once a year, a publication containing:

> (a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;
>
> (b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Part;
>
> (c) a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution; and
>
> (d) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Part should be sent.

In her special report, Commissioner Legault noted that this information is known as Info Source. She explained that, "Info Source was intended to be used by the public to help determine what information holdings government institutions have and what types of general information could be requested." According to Commissioner Legault, without a resource like Info Source, "requesters will have increased difficulty meeting the new requirements found in new section 6."[39] (Clause 6 is discussed in the next section of this Legislative Summary.)

For these reasons, she recommended removing the amendment to section 5.[40] The Committee recommended no change to clause 5. **However, the Senate recommended deleting the proposed change to section 5, and the House of Commons accepted this change. As a result, the information in Info Source is maintained, and section 5 of ATIA remains unchanged.**

2.1.4.2 Clause 6 (Reasons for Declining to Act on an Access Request)

Clause 6 initially amended section 6 by adding that a request for access to a record must not only provide sufficient detail (the French version of the bill replaced "en des termes suffisamment précis" with "avec suffisamment de détails") to enable an experienced employee of the institution to identify the record with a reasonable effort, but must also contain the following information:

(a) the specific subject matter of the request;
(b) the type of record being requested; [and]
(c) the period for which the record is being requested or the date of the record.

In her special report, Commissioner Legault wrote that the proposed amendment creates a barrier to access and that the added criteria "are also so specific, particularly the requirement for type of record, that they increase the possibility that requesters will not get the information they are seeking."[41] Consequently, she recommended removing the proposed amendments to section 6 because "[t]he current requirements in the Act are sufficient to allow institutions to process a request."[42]

The new Information Commissioner, Caroline Maynard, shared this same concern with the Committee in May 2018, stating that she believes the mandatory requirements that would be added to the ATIA by clause 6 would limit access and probably deter people from asking for information.[43] **She raised the same concerns before the Senate Committee.[44]**

The Senate proposed an amendment to clause 6 deleting the requirements concerning the subject matter of the request, the type of record and the period for which the record is being requested or the date of the record. The House of Commons accepted this amendment. Section 6 of the ATIA now sets out only one requirement, that the request provide "sufficient detail to enable an experienced employee of the institution to identify the record with a reasonable effort."

Clause 6 also provided for a new section 6.1(1) to the ATIA, which would have permitted the head of a government institution to decline to act on an access request if, in his or her opinion:

> (a) the request does not meet the requirements set out in section 6;
> (b) the person has already been given access to the record or may access the record by other means;
> (c) the request is for such a large number of records or necessitates a search through such a large number of records that acting on the request would unreasonably interfere with the operations of the government institution, even with a reasonable extension of the time limit set out in section 7; or
> (d) the request is vexatious, is made in bad faith or is otherwise an abuse of the right to make a request for access to records.

Regarding new section 6.1(1)(b), Commissioner Legault stated in her special report that it would "[allow] institutions not to respond to legitimate re-requests for information that has been lost." Furthermore, "[t]his ground [would] also [allow] institutions to decline to act on requests where the requester would like the same records to be re-processed because of a change of circumstances that could lead to further disclosure."[45]

In the Commissioner's opinion, allowing the head of a government institution to decline to act on an access request because the requester could access the records by other means was also problematic. In her view,

> [i]nvestigations by the OIC [Office of the Information Commissioner of Canada] have shown that for some requesters, information that is published online is not always reasonably accessible. For example, not all persons living in remote northern communities have ready access to the Internet.[46]

For these reasons, she recommended removing new section 6.1(1)(b).[47]

Regarding new section 6.1(1)(c), Commissioner Legault pointed out that it is not clear what "such a large number of records" means and that the proposed provision is "a disincentive to institutions to establish good information management practices."[48] She believed that the proposed amendment would allow the government to decline to respond to valid requests and that it is not necessary for the proper administration of the ATIA. She therefore recommended removing new section 6.1(1)(c).[49]

However, Commissioner Legault recommended that new section 6.1(1)(d), which deals with requests that are vexatious or made in bad faith, be kept, as it is consistent with her recommendations (and those made by the Committee) and sufficient on its own to deal with requests that amount to an abuse of the right of access, without overreaching.[50]

After considering the bill, the Committee proposed a few amendments to new section 6.1(1) of the ATIA to address some of the concerns raised by Commissioner Legault and other witnesses about this section.[51]

First, the Committee recommended adding wording in the passage preceding the paragraphs of the new subsection to the effect that the head of a government institution may decline to act on an information request for the reasons set out in the subsequent paragraphs, but must have the Information Commissioner's written approval in order to do so.

Regarding the paragraphs, the Committee recommended deleting new section 6.1(1)(a) and adding the word "identical" to new section 6.1(1)(b) (which becomes section 6.1(1)(a)) to qualify the type of record to which access has already been given, which could warrant a refusal to act on the request. In the same section, the Committee also recommended adding the word "reasonably" to specify that an identical record must be reasonably accessible by other means in order for a head of a government institution to decline to act on a request because of its existence.

No amendment was proposed to new section 6.1(1)(c) (which becomes section 6.1(1)(b)). This paragraph authorizes the refusal to act on a request if the request is for such a large number of records or necessitates a search through such a large number of records that acting on the request would unreasonably interfere with the operations of the institution.

However, the Committee recommended that a new section 6.1(1.1) be added to provide for the following:

> The head of a government institution is not authorized under paragraph (1)(b) to decline to act on a person's request for a record for the sole reason that the information contained in it has been published under Part 2.

No amendment was made to new section 6.1(1)(d) with respect to requests that are vexatious or made in bad faith (which becomes section 6.1(1)(c)).

The Committee also recommended new wording for new section 6.1(2). This section of the ATIA still requires the head of a government institution who declines to act on an access request to give the requester written notice of their decision and the reasons for their decision. However, it no longer contains an obligation for the head of a government institution to give written notice to the requester that the person has a right to make a complaint about the decision to the Information Commissioner since, under the proposed amendment to section 6.1(1), any refusal to act on a request requires the Information Commissioner's written approval.

Following the Senate Committee's consideration of the bill, the Senate recommended an amendment to delete the first three reasons for the head of an institution to decline to act on an access request. Based on this amendment, the head of an institution could decline to act on a request under section 6 of the ATIA, with the written approval of the Information Commissioner, if the request "is vexatious, is made in bad faith or is otherwise an abuse of the right to make a request for access to records."

The Senate also proposed the addition of new subsections to section 6.1 of the ATIA. New subsection 6.1(1.2) suspends the period set out in section 7 for responding to a request when the head of a government institution communicates with the Information Commissioner to obtain approval to decline to act. New subsections 6.1(1.3) and 6.1(1.4) stipulate that the head of the government institution is to inform in writing the person making the request for access of the suspension of the period, the reasons for the suspension and, should the Information Commissioner refuse to allow the head of the institution to decline to act, the date on which the period resumes. The House of Commons accepted this amendment.

2.1.4.3 Clause 7 (Fees)

Clause 7 amends section 11, which pertains to fees. New sections 11(1) and 11(2) keep fees in place up to a maximum of $25 (currently $5 as prescribed by regulation[52]) and also allow the head of a government institution to require additional fees as prescribed by regulation.

In her special report, Commissioner Legault argued that "[f]ees cause undue delays, lead to abuse, increase costs in the administration of the Act, and are inconsistent with an open by default government."[53] Consequently, she recommended that all fees related to access requests be eliminated.[54]

The Senate proposed an amendment to clause 7 changing new section 11(2) to waive a fee rather than require additional fees from the person making a request. This amendment was accepted by the House of Commons. New section 11(2) of the ATIA states that "head of a government institution to which a request for access to a record is made under this Part may waive the requirement to pay a fee or a part of a fee under this section or may refund a fee or a part of a fee paid under this section."

2.1.4.4 New Clause 11.1 (Refusal to Disclose a Record)

In its report, the Committee proposed adding new clause 11.1 to replace the wording in section 26 of the ATIA with a new, almost identical provision that now states that the head of a government institution may refuse to disclose any record in whole or in part if the head of the institution has reason to believe that the material in the record will be published "other than under Part 2" of the ATIA (proactive publication by government institutions).[55]

2.1.4.5 Clause 13 (Reasons for Refusing or Ceasing to Investigate Relating to the Information Commissioner)

Clause 13 adds new section 30(4) to the ATIA, permitting the Information Commissioner to refuse or cease to investigate a complaint if, in the Commissioner's opinion:

> (a) the complaint is trivial, frivolous or vexatious or is made in bad faith; or
>
> (b) an investigation or any further investigation is unnecessary having regard to all the circumstances of the complaint, including that the complaint is already the subject of an investigation or that the subject matter of the complaint has already been the subject of a report by the Commissioner.

New section 30(5) provides that if the Information Commissioner refuses or ceases to investigate a complaint, he or she shall give written notice to:

> (a) the complainant, stating the reasons for refusing or ceasing to investigate the complaint;
>
> (b) the head of the government institution concerned, if the Commissioner provided the head of the institution with a notice under section 32;
>
> (c) any third party that was entitled under paragraph 35(2)(c) to make and that made representations to the Commissioner in respect of the complaint; and
>
> (d) the Privacy Commissioner, if the Information Commissioner consulted him or her under **subsection 36(1.1) or** section 36.2.

In her special report, Commissioner Legault stated that

> [t]his amendment would be a positive change. The circumstances in which such a scenario would arise are rare, and the threshold to meet is quite high. However, this is an important addition to the Commissioner's power to control the investigation process.[56]

The Committee proposed amending clause 13 by deleting new section 30(1)(a.1) of the ATIA, which provided that the Information Commissioner would receive and investigate complaints "from persons who have made a request for access to a record that the head of a government institution has declined to act on." **This amendment reflects the changes to section 6 of the ATIA.**

2.1.4.6 Clause 14 (Right of the Privacy Commissioner to Make Representations in the Course of an Investigation)

Clause 14 adds new section 35(2)(d) to the ATIA to include the Privacy Commissioner on the list of individuals given the right to make representations to the Information Commissioner in the course of an investigation. This right is restricted to cases where the Information Commissioner consults the Privacy Commissioner under new subsection 36(1.1) or new section 36.2.

New subsection 36(1.1) was added following an amendment proposed by the Senate. It stipulates that the Information Commissioner may consult the Privacy Commissioner during the investigation of any complaint and may disclose personal information to him or her in the course of the consultation.

New section 36.2 (contained in clause 16, discussed in section 2.1.4.8 of this Legislative Summary) requires the Information Commissioner to consult the Privacy Commissioner in cases where he or she intends to make an order requiring the head of a government institution to disclose a record, or part of a record, that the head of the institution refuses to disclose under section 19(1) of the ATIA. Under this provision, the Information Commissioner may, in the course of the consultation, disclose personal information to the Privacy Commissioner.

In her special report, Commissioner Legault stated that

> [t]his amendment adds an unnecessary procedural burden to the Information Commissioner's investigations. It creates a common investigation between two independent Agents of Parliament for complaints involving the application of the exemption for personal information.[57]

She added that the proposed amendment is "inappropriate, unnecessary, and has the potential to delay investigations and impede even further timely access." For these reasons, the Commissioner recommended

- removing notification to, and consultation with, the Privacy Commissioner;
- eliminating the reasonable opportunity for the Privacy Commissioner to make representations during an investigation; and
- not granting the Privacy Commissioner the right to apply for a review of access to information decisions (see section 2.1.4.10 of this Legislative Summary).[58]

In the first reading version, new section 36.2 provided for the possibility of consulting the Privacy Commissioner (the Information Commissioner "may" consult the Privacy Commissioner). Owing to an amendment proposed by the Senate and accepted by the House of Commons, the new provision imposes a requirement to consult the Privacy Commissioner (the Information Commissioner "shall" consult).

2.1.4.7 Clause 15 (Solicitor–Client Privilege or the Professional Secrecy of Advocates and Notaries and Litigation Privilege)

Clause 15 amends section 36(2) of the ATIA by adding that, with respect to investigations under new Part 1 of the Act, the Information Commissioner may examine any record to which Part 1 applies that is under the control of a government institution and that no such record may be withheld from the Commissioner, "[d]espite any other Act of Parliament, any privilege under the law of evidence, solicitor–client privilege or the professional secrecy of advocates and notaries and litigation privilege, and subject to subsection (2.1)."

New section 36(2.1) provides the following:

> The Information Commissioner may examine a record that contains information that is subject to solicitor–client privilege or the professional secrecy of advocates and notaries or to litigation privilege only if the head of a government institution refuses to disclose the record under section 23.

Clause 10 amends section 23 to use the same wording: "The head of a government institution may refuse to disclose any record requested under this Part that contains information that is subject to solicitor–client privilege or the professional secrecy of advocates and notaries or to litigation privilege."

New section 36(2.2) states that the disclosure to the Information Commissioner of a record containing information that is subject to solicitor–client privilege or the professional secrecy of advocates and notaries or to litigation privilege does not constitute a waiver of those privileges or that professional secrecy.

In her special report, Commissioner Legault wrote that the proposed amendment is a positive one and that it "codifies clear and unambiguous language in the Act to ensure oversight of the government's decisions to refuse disclosure on the basis of the solicitor–client privilege exemption."[59]

2.1.4.8 Clause 16 (Power to Make Orders)

Clause 16 adds new sections 36.1, **36(1.1),** 36.2 and 36.3 to the ATIA. **New sections 36(1.1) and 36.2 are discussed in section 2.1.4.6 of this Legislative Summary.**

New section 36.1(1) authorizes the Information Commissioner to make any order he or she considers appropriate in respect of a record to which new Part 1 applies (after investigating a complaint described in any of sections 30(1)(a) to 30(1)(e). This includes requiring the head of the government institution that has control of the record in respect of which the complaint is made:

(a) to disclose the record or a part of the record; and
(b) to reconsider their decision to refuse access to the record or a part of the record.

New section 36.1(2) states that this power does not apply to the investigation of complaints initiated by the Commissioner where he or she has reasonable grounds to believe that a matter relating to a request to access records under this Act or obtaining access to them should be investigated (current section 30(3)).

New section 36.1(3) provides that the order may include any condition that the Commissioner considers appropriate. New section 36.1(4) states that the order takes effect on:

(a) the 31st business day after the day on which the head of the government institution receives a report under subsection 37(2), if only the complainant and the head of the institution are provided with the report; or
(b) the 41st business day after the day on which the head of the government institution receives a report under subsection 37(2), if a third party or the Privacy Commissioner is also provided with the report.

New section 36.1(5) creates the presumption that the head of the government institution is deemed to have received the report on the fifth business day after the date of the report. New section 36.3(1) requires the Information Commissioner to make every reasonable effort to give written notice to third parties if he or she intends to make an order requiring the head of a government institution to disclose a record, or part of a record, that the Commissioner has reason to believe might contain:

- trade secrets of a third party;
- confidential financial, commercial, scientific or technical information supplied to a government institution by a third party (section 20(1)(b) of the ATIA);
- information that is supplied in confidence to a government institution by a third-party concerning emergency management plans, as well as the vulnerability and protection of buildings, or computer or communications networks or systems (section 20(1)(b.1) of the ATIA); or
- information the disclosure of which could reasonably be expected to result in material financial loss or gain to a third party, to prejudice the competitive position of a third party, or to interfere with negotiations of a third party (sections 20(1)(c) and 20(1)(d) of the ATIA).

New section 36.3(2) sets out what information this notice must include.

In her special report, Commissioner Legault argued that "the 'orders' under the bill lack the hallmarks of an order." She stated that, "[u]nder Bill C-58, court review is *de novo*. Review is not of the Commissioner's 'order,' but of the government's decision"[60] (see section 2.1.4.11 of this Legislative Summary concerning *de novo* reviews). She added that

> Bill C-58's new ability for the Commissioner to "order" disclosure of information is an ability without teeth. It adds very little from the recommendation power currently found in the Act and achieves none of the benefits of an order-making model.[61]

Commissioner Legault further criticized the bill for not providing a mechanism by which orders can be certified, meaning that

> there is no recourse available in Bill C-58 to address situations where the institution neither follows an order of the Commissioner, nor applies to the Federal Court for a review. Bill C-58 does not include any circumstances in which the Commissioner can initiate a proceeding as an applicant before the Federal Court.[62]

Consequently, she recommended that section 36.1 be amended "so that any order of the Information Commissioner can be certified as an order of the Federal Court."[63] **The Senate proposed an amendment in this regard that the House of Commons rejected. The Senate did not insist on the amendment.**

2.1.4.9 Clause 17 (Reports to Complainant, Government Institution and Other Persons and Publication)

Clause 17 amends section 37 of the ATIA, in particular by stating in section 37(2) that, after investigating a complaint, the Information Commissioner shall provide a report setting out the results of the investigation and any order or recommendations that he or she makes to the complainant, the head of the government institution, third parties concerned and the Privacy Commissioner.

In accordance with a Senate proposal, an amendment was made to section 37(2) stating that the Information Commissioner is required to report to the Privacy Commissioner only if the latter was entitled under section 35(2)(d) to make representations to the Information Commissioner and did so.

In its report, the Committee proposed amending clause 17 by adding new sections 37(3.1) and 37(3.2). New section 37(3.1) provides that the Information Commissioner may publish the report referred to in section 37(2) of the ATIA.[64] New section 37(3.2) states that any publication of a report under section 37(3.1) must wait until the periods to apply to the Court for a review of a matter, which are referred to in section 41, have expired.

2.1.4.10 Clause 19 (Application for Review by the Federal Court)

Clause 19 replaces sections 41 to 43 of the ATIA with new sections 41, 41.1, 41.2, 42 and 43.

New section 41 provides that any of the following individuals may apply for a review of the order set out in the report described in section 37(2), or of matters that are the subject of the order:

- the complainant (who makes a complaint described in any of sections 30(1)(a) to 30(1)(e) of the ATIA);
- the head of the government institution involved;
- a third party concerned; or
- the Privacy Commissioner.

This review would be conducted by the Federal Court within the time frames provided and in the prescribed manner.

New section 41.1 provides that an application for review under new section 41 "operates as a stay of any order set out in a report received under subsection 37(2) by the person who made the application until the proceedings are finally concluded."

New section 43 provides that if the complainant, a third party or the Privacy Commissioner applies for a review under section 41, he or she shall immediately serve a copy of the originating document on the head of the government institution concerned. Conversely, if the head of a government institution applies for such a review, he or she shall immediately serve a copy of the originating document on the individuals who are entitled to receive a report under section 37(2), and on the Information Commissioner. Furthermore, when the head of a government institution is served with a copy of an originating document under section 43(1), he or she shall give written notice of the application to the other individuals who are entitled to receive a report under section 37(2), and to the Information Commissioner (unless they have already been served with a copy of the document in question).

In her special report, Commissioner Legault recommended that sections 41 to 48 of the ATIA be amended "to reflect that it is the Commissioner's order that is under review before the Federal Court."[65]

2.1.4.11 Clause 21 (*De Novo* Review)

Clause 21 adds new section 44.1 to the ATIA to specify that an application under section 41 or 44 (concerning applications for review made by a third party) is to be heard and determined as a new proceeding.

In her special report, Commissioner Legault noted that

> [a] *de novo* hearing allows institutions to present new or more thorough representations to the Court and the Office of the Information Commissioner's experience with this type of review has found that it can, at times, result in the application of new exemptions. *De novo* review provides no incentive for institutions to provide sufficient reasons to establish that information warrants not being disclosed during investigations.[66]

For these reasons, she recommended removing section 44.1.[67] **It was not removed from the bill, and new section 44.1 is now included in the ATIA.**

2.1.4.12 Clause 24 (Burden of Proof Regarding New Section 41)

Clause 24 amends section 48 of the ATIA to provide that, with respect to applications under new sections 41(1) and 41(2), the onus is on the government institution concerned to establish that the head of the institution is authorized to refuse to disclose the record requested, or to take the action or make the decision that is the subject of the application (new section 48(1)).

New section 48(2) provides that, with respect to applications under new sections 41(3) and 41(4), the onus is on the person who made the application to establish that the head of the government institution is not authorized to disclose the record described in that subsection and requested under new Part 1.

2.1.4.13 Clause 25 (Order of Federal Court)

Clause 25 adds new sections 50.1 to 50.4, concerning procedures for Federal Court orders with respect to judicial reviews. New section 50.3 states that an order of the Federal Court (made under sections 49 to 50.2) rescinds the provisions of the Information Commissioner's order that are incompatible with the Court's order. In such a case, the Court must specify which provisions of the Information Commissioner's order are rescinded (new section 50.4).

2.1.4.14 New Clause 30.1 (Information Not to Be Disclosed)

In its report, the Committee proposed amending the bill by adding new clause 30.1, which replaces the portion of section 64 of the ATIA before paragraph (a) with the following:

> 64 In carrying out an investigation under this Act and in any report published under subsection 37(3.1) or made to Parliament under section 38 or 39, the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner shall take every reasonable precaution to avoid the disclosure of, and shall not disclose,

The replacement text simply adds a reference to new section 37(3.1) to ensure that reports released by the Information Commissioner are also subject to the provisions of section 64 regarding information not to be disclosed when information is published.

2.1.4.15 Clause 31 (Part 1 Does Not Apply to Certain Materials)

The Committee proposed amending clause 31 to state in section 68(a) that the ATIA does not apply to published material, other than material published under new Part 2, or material available for purchase by the public.

2.1.4.16 Clause 34 (Power to Make Regulations)

Clause 34 adds new section 71, which outlines the power of the Governor in Council to make regulations (this power was set out in section 77 of the previous ATIA).

2.1.5 New Part 2: Proactive Publication of Information

2.1.5.1 Clause 36 (Senate, House of Commons and Parliamentary Entities)

Clause 36 adds new sections 71.01 to 71.14 to the ATIA concerning travel expenses, hospitality expenses and certain contracts, with respect to:

- senators (new sections 71.02 to 71.04);
- members of the House of Commons (new sections 71.05 to 71.07); and
- heads of "parliamentary entities" (new sections 71.08 to 71.11).

New section 71.08 specifies those individuals who are considered to be the "head of a parliamentary entity."

New sections 71.12 and 71.13 provide that the new provisions on proactive publication do not apply if the Speaker of the Senate or of the House of Commons, as applicable and as required, determines that the publication of the relevant information in a given case could constitute a breach of parliamentary privilege or could compromise the security of persons, infrastructure or goods in the parliamentary precinct.
New section 71.14 states that this determination is final.

2.1.5.2 Clause 37 (Ministers, Government Institutions and New Part 3)

Clause 37 replaces sections 72 to 77 of the ATIA and creates new sections 72 to 101.

New Part 2 of the ATIA contains new sections 72 to 91. New Part 3 begins at new section 92.

New sections 72 to 80 describe the information that must be published concerning ministers:

- briefing materials prepared for the minister;
- travel expenses;
- hospitality expenses;
- certain contracts; and
- expense reports.

New section 73 provides that the prime minister shall cause to be published the original or revised ministerial mandate letters. In her special report, Commissioner Legault recommended imposing "a timeline to proactively disclose mandate letters and revisions to mandate letters, consistent with the timelines currently under the Act."[68]

New sections 81 to 90 describe the information that must be published concerning government institutions:

- travel expenses;
- hospitality expenses;
- reports tabled in Parliament;
- the reclassification of positions;
- certain contracts;
- certain grants and contributions; and
- certain briefing materials.

New section 81 defines a "government entity" as a government institution that is:

> (a) a department named in Schedule I to the *Financial Administration Act*,
> (b) a division or branch of the federal public administration set out in column I of Schedule I.1 to that Act, or
> (c) a corporation named in Schedule II to that Act.

Section 3 of the ATIA currently defines a "government institution" 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*.

In her special report, Commissioner Legault wrote that "[i]nconsistent and confusing disclosure obligations persist under these provisions as a result of the differences between the definition of a 'government institution' and a 'government entity.'"[69]

New section 91 ("General") states that, despite any provision of Part 1, the Information Commissioner shall not exercise his or her powers or perform his or her duties and functions under Part 1 in respect of any matter relating to Part 2, including:

> (a) any information or materials that must be published; and
> (b) the exercise of a power or the performance of a duty or function under Part 2 by any person or entity.

In her special report, Commissioner Legault recommended removing section 91 "in order for the Commissioner to have jurisdiction over proactively disclosed materials."[70] The Committee heard from several witnesses who also expressed concern that proactive publication under the new Part 2 of the ATIA is entirely beyond the Commissioner's oversight powers.[71]

In its report, the Committee therefore proposed a number of amendments to clause 37 pertaining to certain provisions of new Part 2 in order to

- impose a maximum deadline of 30 days for the Prime Minister to cause to be published in electronic form any letter or revised letter in which he or she establishes the mandate of any other minister, under section 73 of the ATIA;
- replace, in the English version of section 80 of the ATIA, "head of a government institution" with "minister," and the reference to sections 82 to 88 with a reference to sections 74 to 78;
- provide in section 86(2) of the ATIA a deadline of "60 days after the end of that quarter if that quarter is the fourth quarter" for the head of a government entity to cause to be published information set out in section 86(1) of the ATIA regarding a contract that is amended so that its value exceeds $10,000. The current deadline is 30 days after the end of the quarter during which the contract was amended;
- add to section 86(3) of the ATIA a deadline of "60 days after the end of that quarter if that quarter is the fourth quarter" for the head of a government entity to cause to be published in electronic form the value of the contract as amended; and
- replace section 91 of the ATIA with new sections 91(1) and 91(2):
    - Section 91(1) prohibits the Information Commissioner from exercising any powers or performing any duties or functions in relation to the proactive publication of information under Part 2 of the ATIA, including any powers, duties or functions under Part 1, such as receiving and investigating complaints.
    - Section 91(2), however, allows the Information Commissioner to exercise his or her powers or perform his or her duties and functions under Part 1 when the record, although subject to Part 2, is also subject to a request for access under Part 1.

The Senate proposed an amendment to clause 37 authorizing the Information Commissioner to review annually the operation of this Part of the Act and include comments and recommendations regarding that review in his or her Report to Parliament. The House of Commons rejected the amendment, stating that providing the Information Commissioner with oversight over proactive publication by institutions supporting Parliament and the courts has the potential to infringe parliamentary privilege and judicial independence.[72] The Senate did not insist on the amendment and, consequently, the Information Commissioner has no oversight over Part 2 of the ATIA.

The Senate also proposed amending clause 37 to insert in section 77 of the ATIA, which concerns contracts over $10,000, the same provisions regarding the 60-day deadline as were included in sections 86(2) and (3) mentioned above. This amendment, which was accepted by the House of Commons, also stipulates that the value of an amended contract does not have to be published unless the value increases or decreases by more than $10,000.

Lastly, the Senate proposed adding new section 99.1, which provides that a committee referred to in new section 99 of the ATIA must review the Act within one year after the section comes into force and every five years thereafter. The new provision also stipulates that the committee conducting the review is to present a report on each review of the Act setting out its conclusions and any recommended changes to the Act. This amendment was accepted by the House of Commons.

Clause 37 also provides for new sections 92 to 101, which make up new Part 3 ("General") of the ATIA.

New section 93 provides that the designated minister (the President of the Treasury Board) shall undertake a review of the ATIA within one year after the day on which new section 93 comes into force, and every five years afterwards. He or she shall also cause a report to be laid before each House of Parliament.

In her special report, Commissioner Legault noted that this provision allows the government to lead the review. "This is not the same as a parliamentary committee, made up of members of all the recognized parties in the House of Commons." She added that the proposed measure "is atypical for legislative review clauses and gives no deadline for when the government's review should be completed."[73] For these reasons, Commissioner Legault recommended instead that "[t]here should be mandatory parliamentary review of the *Access to Information Act*."[74]

New section 101 grants the Governor in Council broader powers to make regulations and issue orders in order to amend Schedule I of the ATIA, which lists the government institutions that are subject to the Act.

New section 101(1) provides that "[t]he Governor in Council may make regulations prescribing criteria for adding, under paragraph (2)(a), the name of a body or office to Schedule I."

In addition, new section 101(2) provides that the Governor in Council may, by order:

> (a) add to Schedule I the name of any department, ministry of state, body or office of the Government of Canada;

(b) replace in Schedule I the former name of any department, ministry of state, body or office of the Government of Canada with its new name; and

(c) delete from Schedule I the name of any department, ministry of state, body or office of the Government of Canada that has ceased to exist or has become part of another department, ministry of state, body or office of the Government of Canada.

2.1.5.3 Clause 38 (Office of the Registrar of the Supreme Court of Canada, Courts Administration Service and Office of the Commissioner for Federal Judicial Affairs)

Clause 38 adds new sections 90.01 to 90.24 to the ATIA. New sections 90.01 to 90.21 describe the information that must be published concerning the relevant institutions.

New section 90.22 specifies that new sections 90.03 to 90.09, 90.11 to 90.13 and 90.15 to 90.21 do not apply to "any of the information or any part of the information referred to in those sections if the Registrar, the Chief Administrator or the Commissioner, as applicable, determines that the publication could interfere with judicial independence."

The Senate proposed an amendment to clause 38, which led to changes to section 90.22. This section now reads as follows:

> **The Registrar, the Chief Administrator or the Commissioner, as applicable, may, on an exceptional basis, decline to cause to be published information or any part of the information described in any of sections 90.03 to 90.09, 90.11 to 90.13 and 90.15 to 90.21 if they determine that the publication, even in the aggregate, could interfere with judicial independence.**

New section 90.23 provides that the Registrar, the Chief Administrator or the Commissioner, as applicable, is not required to cause to be published any of the information in question if he or she determines that:

(a) the information or the part of the information is subject to solicitor–client privilege or the professional secrecy of advocates and notaries or to litigation privilege; or

(b) the publication could compromise the security of persons, infrastructure or goods.

New section 90.24 states that this determination by the Registrar, the Chief Administrator or the Commissioner is final.

Clause 38 caused concern among the institutions affected by the provisions, namely, the Office of the Registrar of the Supreme Court of Canada, the Courts

Administration Service, and the Office of the Commissioner for Federal Judicial Affairs. Given the importance of judicial independence, they and several other stakeholders expressed reservations about the provisions concerning the proactive publication of information about judges.[75]

Consequently, the Senate recommended an amendment to clause 38 to address these concerns and provide a balance between ensuring transparency and protecting judicial independence and judges' safety.[76] The amendment made several changes to new sections 90.01 to 90.22 of the ATIA.

For example, rather than requiring the publication of individualized information on a judge's expenses and the judge's name, the amendment provides for the publication of information for a group of judges and by category of expenditures reimbursed. The amendment to clause 38 was accepted by the House of Commons.

2.1.5.4 Clause 41 (Replacement of "This Act")

In its report, the Committee proposed amending clause 41 by deleting section 26 from the list of provisions where a terminological change is required to the English version of the ATIA (replacing "this Act" with "this Part"). The deletion is due simply to the fact that "this Act" no longer appears in the English version of section 26 because of the substitution text proposed in new clause 11.1.

2.2 AMENDMENTS TO THE *PRIVACY ACT*

Clauses 47 to 57 amend the *Privacy Act*.

Clause 47 adds new paragraph (j.1) to the definition of "personal information" under section 3 of the *Privacy Act* in order to exclude from this definition "ministerial advisers" and members of a "ministerial staff" within the meaning of the *Conflict of Interest Act*.[77]

In its report, the Committee proposed adding new clause 47.1. The purpose of this clause is to amend the *Privacy Act* by adding a new section 3.02 after section 3.01. Section 3.02 defines the scope of new paragraph (j.1) as follows: "Paragraph (j.1) of the definition *personal information* in section 3 applies only to records created on or after the day on which that paragraph comes into force."

Clause 50 adds new sections 34(2.1) and 34(2.2) to the *Privacy Act*. New section 34(2.1) provides that "[t]he Privacy Commissioner may examine information that is subject to solicitor–client privilege or the professional secrecy of advocates and notaries or to litigation privilege only if the head of a government institution refuses to disclose the information under section 27." New section 34(2.2) states that this disclosure does not constitute a waiver of those privileges or that professional secrecy.

Clause 54 adds new section 71.1 to the *Privacy Act*. It provides that "[t]he designated Minister may provide services with respect to the administration of this Act to the public and to any government institution."

Clause 57 amends section 77(2) of the *Privacy Act*, which concerns amendments to the schedule listing the government institutions that are subject to the Act. The Governor in Council is currently authorized only to add to the schedule, by order, the name of any federal government department, ministry of state, body or office. However, under new section 77(2), he or she may also, by order:

- replace in the schedule the former name of any department, ministry of state, body or office of the Government of Canada with its new name; and
- delete from the schedule the name of any department, ministry of state, body or office of the Government of Canada that has ceased to exist or has become part of another department, ministry of state, body or office of the Government of Canada.

2.3 COMING INTO FORCE

Lastly, clause 63 provides that sections 36 and 38 will come into force on the first anniversary of the day on which the bill receives Royal Assent. **Initially, various other clauses, including some in Part 1, were to come into force a year after Royal Assent.**

The bill being silent on the coming into force of the remaining provisions, the default rule will apply, and these provisions will come into force on the day the bill receives Royal Assent.[78]

In her special report, Commissioner Legault pointed out that, in the initial bill, "the parts of the bill related to complaints and the Commissioner's investigations do not become effective for one year and will only be applicable to those complaints received after that effective date."[79] In her view, a transition period was unnecessary and could even have a number of negative consequences, since the Office of the Information Commissioner could have two concurrent investigation systems running at the same time: "one for older complaints made under the ombudsperson system, and the other for new complaints made once the oversight model in Bill C-58 comes into effect."[80]

What is more, Commissioner Legault believed that this transition period would have impacted not only institutions – which would have had to deal with two different investigation processes depending on the timing of the complaint – but also requesters' rights. She stated that, "institutions will be able to decline to process requests immediately, but the Commissioner will not be able to issue an 'order' directing institutions to process a request it has declined within this one year period."[81]

For these reasons, Ms. Legault recommended that all complaints be subject "to the new oversight model at the same time, regardless of when the complaint was received."[82]

The new Information Commissioner, Caroline Maynard, echoed Ms. Legault's concerns when she appeared before the Committee in May 2018. She argued that if the bill were enacted as drafted, her office would have to manage, for a certain number of years, three distinct complaint and investigation processes (the old system of complaints with recommendations, a new system with recommendations, and one year later, the coming into force of the provisions allowing the Information Commissioner to issue orders). Ms. Maynard believed that this would present operational challenges for her office.[83] **She made the same arguments before the Senate Committee in 2019.[84]**

The Senate proposed an amendment to clause 63, which was accepted by the House of Commons. The amendment stipulated that, aside from clauses 36 and 38 concerning proactive publication, all clauses would come into force on 21 June 2019, the date of Royal Assent.

NOTES

1. Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts, 1st Session, 42nd Parliament (S.C. 2019, c. 18).
2. House of Commons, Standing Committee on Access to Information, Privacy and Ethics [ETHI], *Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, Seventh Report, 1st Session, 42nd Parliament (version adopted by ETHI 8 November 2017, tabled in the House of Commons on 20 November 2017) .
3. **Senate, Standing Committee on Legal and Constitutional Affairs [LCJC], *Report of the Committee*, Thirtieth Report, 1st Session, 42nd Parliament, 30 April 2019.**
4. **House of Commons, *Debates*, 1st Session, 42nd Parliament, 18 June 2019, 1515.**
5. *Access to Information Act* [ATIA], R.S.C. 1985, c. A-1.
6. *Privacy Act*, R.S.C. 1985, c. P-21.
7. *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, paras. 40 and 79.
8. ATIA, s. 2(1).
9. *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, para. 61.
10. The right of access is set out in section 4(1) of the ATIA, and section 3 of the ATIA specifies the federal institutions that are covered by the Act.
11. Exemptions "permit or require institutions to withhold a range of records and information from disclosure," while exclusions "provide that the Act does not apply to certain records or information." See Information Commissioner of Canada, *Striking the Right Balance for Transparency: Recommendations to modernize the* Access to Information Act, March 2015, pp. 39–69.
12. ATIA, s. 54(1).
13. *Federal Accountability Act*, S.C. 2006, c. 9.

14. Office of the Information Commissioner of Canada [OIC], "Changes to the Access to Information Act," Chapter 6 in *2007–2008 Annual Report: A new direction*, 2008.

15. Ibid.

16. Information Commissioner of Canada (2015).

17. Ibid.

18. Cable Public Affairs Channel [CPAC], *The Letters: Access to Information*.

19. Government of Canada, "Speaking notes for the Honourable Scott Brison, President of the Treasury Board to the Canadian Open Dialogue Forum 2016," Speech, 31 March 2016.

20. Ibid.

21. ETHI, *Evidence*, 1st Session, 42nd Parliament, 5 May 2016, 0850 (Honourable Scott Brison, President of the Treasury Board).

22. Ibid.

23. Ibid., 0855 (Brison); and Government of Canada, "Speaking notes for the Honourable Scott Brison, President of the Treasury Board to the Canadian Open Dialogue Forum 2016."

24. Government of Canada, *Interim Directive on the Administration of the* Access to Information Act, 5 May 2016.

25. Ibid., s. 7.5.1; and *Access to Information Regulations*, SOR/83-507, s. 7(1)(a).

26. Treasury Board of Canada Secretariat, "Government of Canada improves Access to Information," News release, 5 May 2016.

27. Government of Canada, "Speaking Notes for the Honourable Scott Brison, President of the Treasury Board, at Carleton University for Right to Know Week," Speech, 26 September 2016.

28. OIC, "Bill C-58 results in a regression of the rights of access to information," News release, 28 September 2017.

29. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency – Recommendations to Improve Bill C-58: An Act to amend the* Access to Information Act *and the* Privacy Act *and to make consequential amendments to other Acts*.

30. Government of Canada, *What We Heard – Revitalizing Access to Information Online Consultations, May – June 2016*.

31. ETHI, *Review of the* Access to Information Act, Second Report, 1st Session, 42nd Parliament, June 2016.

32. Scott Brison, President of the Treasury Board, *Government Response to the Second Report of the Standing Committee on Access to Information, Privacy and Ethics*. In its response, the government reaffirmed that it would be taking a two-phase approach to modernizing the ATIA and that the initial legislative amendments would be introduced in early 2017. Minister Brison and one of his spokespersons later stated that the timelines for implementing the first phase of the reform needed to be reviewed, given the complexity of the reform as well as important considerations such as Canadians' privacy rights, the neutrality of the public service and the independence of the judiciary. See Jim Bronskill, "Liberal government postpones initial Access to Information reforms," *Global News*, 21 March 2017; and Alex Boutilier, "Scott Brison explains delay in promised transparency reforms," *Thestar.com* [Toronto Star Newspapers Limited], 26 March 2017. As mentioned, Bill C-58 was introduced in the House of Commons on 19 June 2017.

33. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*.

34. Ibid.

35. Department of Justice, *Charter Statement – Bill C-58:* An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts, 20 September 2017.

36. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*.

37. Ibid.

38. Section 3 of the *Privacy Act* defines "personal information" as follows:

> [I]nformation about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,
>
> (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,
>
> (f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual,
>
> (h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and
>
> (i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,
>
> but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include
>
> (j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,
>
> (i)the fact that the individual is or was an officer or employee of the government institution,
>
> (ii)the title, business address and telephone number of the individual,
>
> (iii)the classification, salary range and responsibilities of the position held by the individual,
>
> (iv)the name of the individual on a document prepared by the individual in the course of employment, and
>
> (v)the personal opinions or views of the individual given in the course of employment,
>
> (k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,
>
> (l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and
>
> (m) information about an individual who has been dead for more than twenty years.

39. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*.

40. Ibid., Recommendation 27.

41. Ibid.

42. Ibid., Recommendation 1.

43. ETHI, *Evidence*, 1st Session, 42nd Parliament, 8 May 2018, 1020 (Ms. Caroline Maynard, Information Commissioner of Canada, Office of the Information Commissioner of Canada).

44. LCJC, *Evidence*, 1st Session, 42nd Parliament, 17 October 2018 (Ms. Caroline Maynard).

45. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*.

46. Ibid.

47. Ibid., Recommendation 3.

48. Ibid.

49. Ibid., Recommendation 4.

50. Ibid., Recommendation 5.

51. ETHI, *Evidence*, 1st Session, 42nd Parliament, 23 October 2017, 1535, 1610 (Ms. Cara Zwibel, Acting General Counsel, Fundamental Freedoms Program, Canadian Civil Liberties Association), 1545, 1600, 1605 (Mr. Duff Conacher, Co-Founder, Democracy Watch), 1550, 1555 (Mr. Gordon McIntosh, Director, Canadian Committee for World Press Freedom, Canadian Journalists for Free Expression), 1630, 1650, (Mr. Peter Di Gangi, Director, Policy and Research, Algonquin Nation Secretariat, National Claims Research Directors), 1640, 1655, 1700, 1710 (Ms. Heather Scoffield, Ottawa Bureau Chief, The Canadian Press); ETHI, *Evidence*, 1st Session, 42nd Parliament, 25 October 2017, 1545, 1625 (Mr. Drew McArthur, Acting Commissioner, Office of the Information and Privacy Commissioner for British Columbia), 1550 (Mr. Nick Taylor-Vaisey, President, Canadian Association of Journalists), 1600, 1630 (Ms. Katie Gibbs, Executive Director, Evidence for Democracy), 1625 (Ms. Kathleen Walsh, Director of Policy, Evidence for Democracy); ETHI, *Evidence*, 1st Session, 42nd Parliament, 30 October 2017, 1650 (Mr. Robert Ramsay, Senior Research Officer, Research, Canadian Union of Public Employees); and ETHI, *Evidence*, 1st Session, 42nd Parliament, 1 November 2017, 1555, 1600, 1605, 1610, 1615, 1635, 1640, 1645, 1650, 1655 (Ms. Suzanne Legault, Information Commissioner of Canada, Office of the Information Commissioner of Canada).

52. *Access to Information Regulations*, s. 7(1)(a).

53. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*.

54. Ibid., Recommendation 17.

55. ETHI, *Evidence*, 1 November 2017, 1600 and 1605 (Ms. Suzanne Legault, Information Commissioner of Canada, Office of the Information Commissioner of Canada). Commissioner Legault explained to the Committee that information covered by the proactive publication provisions in new Part 2 of the ATIA is information currently subject to the ATIA. If a government institution applies an exemption, the Information Commissioner can review those exemptions. She stated that while she has no issues with proactive disclosure, she does "have an issue if it's basically becoming an exclusion to the application of the *Access to Information Act*. I do not have oversight when the government actually applies exemptions to that proactively disclosed information."

56. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*.

57. Ibid.

58. Ibid., Recommendation 21.

59. Ibid.

60. Ibid.

61. Ibid.

62. Ibid.

63. Ibid., Recommendation 20.

64. ETHI, *Evidence*, 23 October 2017, 1655 (Ms. Heather Scoffield); ETHI, *Evidence*, 25 October 2017, 1610 (Ms. Kathleen Walsh); and ETHI, *Evidence*, 1 November 2017, 1615 (Ms. Suzanne Legault). The possibility of the Information Commissioner publishing her decisions and orders was discussed during the Committee's review of the bill.

65. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*, Recommendation 19.

66. Ibid.

67. Ibid., Recommendation 18.

68. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*, Recommendation 7.

69. Ibid.

70. Ibid., Recommendation 8.

71. ETHI, *Evidence*, 23 October 2017, 1540 (Ms. Cara Zwibel), 1610 (Mr. Gordon McIntosh), 1640, 1655 (Ms. Heather Scoffield); ETHI, *Evidence*, 25 October 2017, 1545 (Mr. Drew McArthur), 1550 (Mr. Nick Taylor-Vaisey), 1555, 1625 (Ms. Kathleen Walsh); and ETHI, *Evidence*, 1 November 2017, 1600, 1605, 1650, 1705 (Ms. Suzanne Legault).

72. House of Commons, "Government Orders," *Journals*, No. 436, 18 June 2019, p. 5677.

73. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*.

74. Ibid., Recommendation 26.

75. LCJC, *Observations to the thirtieth report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-58)*, pp. 20–22.

76. Senate, *Debates*, 1st Session, 42nd Parliament, Vol. 150, No. 282, 1 May 2019, p. 7923.

77. *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2.

78. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 5(4).

79. Information Commissioner of Canada, *Failing to Strike the Right Balance for Transparency*.

80. Ibid.

81. Ibid.

82. Ibid., Recommendation 25.

83. ETHI, *Evidence*, 8 May 2018, 1000 (Ms. Caroline Maynard).

84. LCJC, *Evidence*, 17 October 2018 (Ms. Caroline Maynard).