Resources

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

Information Commissioner of Canada

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Message from the Commissioner

 Suzanne LegaultThe Liberal government was elected on a platform of openness and transparency, promising to renew Canadians' trust in their government. At the beginning of its mandate, it committed to lead a review of the outdated *Access to Information Act* to enhance the openness of government.

Initial policy changes from the government, such as the elimination of all fees except the $5 application fee, were early indicators of positive change. Like many Canadians, I was hopeful that the government would follow through on its promise and introduce significant improvements to the Act.

Just before Parliament's 2017 summer break, the government tabled Bill C-58, which amends the *Access to Information Act*.

In short, Bill C-58 fails to deliver.

The government promised the bill would ensure the Act applies to the Prime Minister's and Ministers' Offices appropriately. It does not.

The government promised the bill would apply appropriately to administrative institutions that support Parliament and the courts. It does not.

The government promised the bill would empower the Information Commissioner to order the release of government information. It does not.

Rather than advancing access to information rights, Bill C-58 would instead result in a regression of existing rights.

It imposes added obligations on requesters when making a request, adds new grounds for institutions to decline to act in response to requests, reintroduces the possibility of various fees, and, for some information, replaces the right of access and independent oversight with proactive disclosure. It allows the government to decide what information Canadians can obtain, rather than letting Canadians decide for themselves.

It also introduces an oversight model where the Commissioner is not truly empowered to order the disclosure of information, and adds burdensome stages to the investigation process that may lead to delays. It does not take advantage of any of the benefits of a true order-making model.

Recent reviews of the *Access to Information Act* from myself and the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics)) have proposed amendments that are required to modernize the Act.Footnote1 These recommendations have largely been ignored in Bill C-58.

This report proposes amendments to improve Bill C-58. I urge the government to follow these recommendations and revise Bill C-58 to ensure we move forward rather than backwards to protect Canadians' right to know.

1. The right of access

The *Access to Information Act* provides a right of access to records under the control of the government.

Requests for access to a record

Current situation

When seeking access to information, requesters have to provide sufficient detail so that an experienced employee of the institution can, with a reasonable effort, identify the record.Footnote2

Institutions have a duty "to make every reasonable effort to assist the person in connection with the request" Footnote3 This includes assisting with the formulation of a request

Recommendation from the Information Commissioner and the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics)

Neither the Commissioner nor the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics) recommended changes to this section.

Bill C-58

Bill C-58 imposes additional obligations on requesters. Their requests will need to fulfill all three of the following requirements:

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.

New paragraph 6.1(1)(a) adds that institutions can decline to act on requests if any one of these criteria are not met (see "Declining to act on a request").

Analysis

This amendment creates a barrier to access.

Faced with meeting these criteria, Canadians may decide not to exercise their quasi-constitutional right to know. There are many reasons for this:

- Canadians' level of literacy.
- Meeting the criteria requires a sophisticated understanding of the workings of government or prior knowledge of the record being sought.
- Revealing the subject matter of the request could deter requesters, such as investigative journalists, who do not want to reveal their line of inquiry.
- In some circumstances, the date or time period of a record is not known. This is often the case in historical research where only the subject matter is known.

Canadian literacy skills

Four out of ten Canadian adults have literacy skills too low to be fully competent in most jobs in our modern economy.

http://www.conferenceboard.ca/hcp/details/education/adult-literacy-rate-low-skills.aspx

These 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. For example, a request for handwritten notes from a meeting would not capture any notes transcribed to a digital format. The need to identify the type of record does not take into account that in a digital environment, records can switch from one format to another.

The OIC (Office of the Information Commissioner of Canada) has already received one complaint about an institution refusing to process a request that did not meet the criteria proposed in Bill C-58.

The requester sought from National Defence correspondence between two named individuals within a 10-week period. National Defence took the position that since the request did not specify a subject matter, it would not process the request.

This request was not difficult to understand or to process, nor would it have unreasonably interfered with the operations of the institution. The requester complained. As a result of the OIC (Office of the Information Commissioner of Canada)'s intervention, National Defence agreed to process the request.

The current requirements in the Act are sufficient to allow institutions to process a request.

Result: Regression

Recommendation 1
Remove the amendments to section 6.

Declining to act on a request

Current situation

The Act does not currently allow institutions to decline to act in response to requests.

In rare instances, some requesters make requests that are frivolous, vexatious or otherwise abusive. Requests such as these are outliers. However, dealing with them can place a strain on public resources, delay delivery of other services and have a negative impact on the rights of other requesters.

Recommendation from the Information Commissioner and the ETHI Committee Standing Committee on Access to

Information, Privacy and Ethics)

The Commissioner and the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics) recommended that institutions be allowed to refuse to process requests that are frivolous, vexatious or an abuse of the right of access. This ability should be strictly circumscribed and limited to only clear instances where the request meets these grounds.Footnote4

Bill C-58

Bill C-58 adds four grounds to allow institutions to decline to act on requests:

1. the request does not include any one of the following requirements:
   a. the specific subject matter of the request;
   b. the type of record being requested; or
   c. the period for which the record is being requested or the date of the record.
2. the requester has already been given access to the record or may access the record by other means;
3. the request is so large or requires searching through so many records that acting on it would unreasonably interfere with the operations of the institution. An institution can decline to act on this request even if an extension could be taken; or
4. the request is vexatious, is made in bad faith or is otherwise an abuse of the right of access.Footnote5

Analysis

The request doesn't include any one of the listed requirements (paragraph 6.1(1)(a))

Requests that could be declined under paragraph 6.1(1)(a)

- All emails between individuals during a set period (no subject)
- List of all briefing notes provided to a named individual during a set period (no subject)
- Tax audit of named individual (no date, no type of record)
- Electronic immigration file of a named individual (no date)
- All records related to a requester (no date, no type of record)

Bill C-58 allows institutions to decline to act on a request where a requester fails to provide any one of the three requirements listed under the new section 6

If this ground to decline to act on a request is left in the bill, it could result in otherwise valid requests not being responded to, because the requester fails to meet the unreasonable criteria set out in section 6.

It is recommended that this ground to decline to act on a request be removed because it severely limits the right of access (see "Requests for access to a record").

Result: Regression

Recommendation 2
Remove paragraph 6.1(1)(a).

The person has already been given access or can access the record by other means (paragraph 6.1(1)(b))

Requests that could be declined under paragraph 6.1(1)(b)

- A request for information that was provided before, but was lost because of an unexpected event, such as a computer failure or flood
- Information online, but the requester lives in a remote northern community and does not have ready internet access
- Information that has been proactively disclosed, such as a briefing package for a new deputy head

Bill C-58 allows institutions to decline to act on a request where a requester: a) has already been given access; or b) could access the record by other means.

Requester has already been given access

Allowing institutions to decline to act on a request because the requester has already been given access to the record is problematic for several reasons. It allows institutions not to respond to legitimate re-requests for information that has been lost. This ground also allows 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.

There are numerous reasons why exemptions that were previously applied to a request could subsequently no longer be applicable. For example, litigation privilege only applies until the end of the litigation; some protections for investigative processes end with the end of the investigation; draft documents may be finalized; decisions may be rendered; and harms that may have been likely at the time of the original request may have been mitigated by the passage of

time.

Requester could access the record by other means

Allowing institutions to decline to act on a request because the requester could access the records by other means is also problematic. Investigations 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.Footnote6

Finally, declining to act on a request because the record is accessible through other means, including for example proactive disclosure, could result in a regression of access rights, since under Bill C-58 there is no independent oversight by the Commissioner of proactively disclosed materials.Footnote7

Result: Regression

Recommendation 3
Remove paragraph 6.1(1)(b).

Large requests that interfere with the operations of an institution (paragraph 6.1(1)(c))

Requests that could be declined under paragraph 6.1(1)(c)

- Tax audit files (10,000 pages)
- Documents pertaining to regulatory aviation safety oversight activities, Helicopter Transport Service (5,000 pages)
- Renewable Energy Approval 8443-9BMG23 for Bow Lake Wind Farm, to be located in the District of Algoma (4,500 pages)

The Act does not allow an institution to decline to act on a request because of a large volume of records or the requirement to search through a large number of records. The Act allows institutions to take reasonable time extensions for responding to requests that are for a large number of records or require searching through a large number of records and meeting the original time limit would unreasonably interfere with the institution's operations.Footnote8

Bill C-58 allows institutions to decline to act on a request for "such a large number of records" or for searching through "such a large number of records" that acting on it would unreasonably

interfere with the operations of the institution. An institution can decline to act on such a request even if a reasonable extension could be taken.

It is not clear what "such a large number of records" means. For example, the OIC (Office of the Information Commissioner of Canada) considers 1,000 pages or more as a benchmark for what constitutes a large number of records. However, TBS (Treasury Board of Canada Secretariat) suggests that more than 500 pages should be considered a large number.Footnote9

This provision is also a disincentive to institutions to establish good information management practices. Inefficient information practices lead to a higher volume of pages that need to be processed, such as duplicate and irrelevant pages, and result in an increased difficulty in locating the relevant records.

Requests related to tax audits, litigation, regulatory approvals, environmental and/or safety monitoring, and historical or archival subjects can result in thousands of responsive pages. Under this new provision they could be declined. This amendment allows the government to decline to respond to valid requests. It is not necessary for the proper administration of the Act.

Result: Regression

Recommendation 4
Remove paragraph 6.1(1)(c).

Frivolous and vexatious requests (paragraph 6.1(1)(d))

Bill C-58 allows institutions to decline to act on a request where it is vexatious, made in bad faith or is otherwise an abuse of the right to make a request for access to records. Requesters would be able to complain to the Commissioner if an institution declines to respond to their request under this provision.

This provision is consistent with the Commissioner's and ETHI's recommendations. This amendment is sufficient on its own to deal with requests that amount to an abuse of the right of access, without overreaching.

Result: Positive

Recommendation 5
Keep paragraph 6.1(1)(d).

2. Coverage of ministers' offices, Parliament and courts

Current situation

Ministers' offices, organizations that support Parliament, and bodies that provide administrative support to the courts are not institutions covered by the Act.Footnote10 However, some records located in ministers' offices are subject to the Act. A two-part test has been devised by the Supreme Court of Canada for determining whether records physically located in ministers' offices are "under the control" of an institution and therefore accessible under the Act.Footnote11

Recommendation from the Information Commissioner and the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics)

The Commissioner recommended that coverage of the Act be extended to ministers' offices, organizations that support Parliament, and bodies that provide administrative support to the courts, with an exemption for information related to parliamentary functions, a provision to protect against infringement of parliamentary privilege, and an exclusion to protect against infringement of judicial independence.Footnote12

The ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics) made the same recommendation, except with an exclusion for information related to parliamentary functions.Footnote13

Bill C-58

Bill C-58 does not subject ministers' offices, organizations that support Parliament, or bodies that provide administrative support to the courts to the right of access. Instead, it codifies a system of proactive disclosure that already exists, for the most part.

Analysis

Submit a complaint

Public office holders make decisions that impact Canadians. These decisions also impact how tax dollars are spent. Ministers' offices, organizations that support Parliament, and bodies that provide administrative support to the courts need to be accountable in disclosing information relating to their administration or other responsibilities.

The government promised to extend the Act to ministers' offices and the administrative institutions that support Parliament and the courts "appropriately."Footnote14 Appropriate coverage under the Act means subjecting ministers' offices, organizations that support Parliament, and bodies that provide administrative support to the courts to the right of access.

Part 2 of Bill C-58 creates a proactive disclosure regime that would require these institutions to:

- disclose materials that are already currently disclosed through policy;
- disclose new materials that are not currently proactively disclosed;
- disclose materials according to specific timeframes; and
- apply exemptions to proactively disclosed materials.

This proactive disclosure regime excludes the oversight function of the Information Commissioner. The bill states the Commissioner cannot exercise her oversight function over any matter relating to proactive disclosure, including any information or materials that must be published.Footnote15

The Bill also prevents requesters from obtaining via an access request information they can currently obtain from government institutions and ministers' offices. This is because the bill gives institutions permission to decline to act on requests where the information is available by other means, such as where it has been proactively disclosed (per new paragraph 6.1(1)(b)).

Proactive disclosure requirements, where the government chooses what is disclosed, are not the same as subjecting these entities to the right of access, where requesters can choose what is requested and are entitled to independent oversight of government's decisions on the disclosure of information.

Ministers' offices

Bill C-58 requires the Prime Minister to disclose the mandate letters provided to ministers, and any revised mandate letters.

It also requires ministers' offices to disclose:

- Minister's briefing materials upon assuming office, the title and tracking numbers of monthly memoranda prepared for the Minister, monthly question period packages

prepared by a government institution for the Minister, and briefing materials for parliamentary appearances of the Minister
- expense reports
- travel expenses
- hospitality expenses
- contracts

Mandate letters

Although Bill C-58 requires proactive disclosure of mandate letters and revisions to them, it provides no timeline for publication and gives institutions permission to decline to act on a request for a mandate letter if it has already been made available. It also does not give the Commissioner oversight over publication, including the application of exemptions.

A legal obligation to publish mandate letters is positive, however, it is tempered by the lack of enforcement if this obligation is not respected.

Further, this change does not subject the Prime Minister's Office to the right of access.

Result: Neutral

Recommendation 6
Subject the Prime Minister's Office to the right of access under the *Access to Information Act*, with an exemption for information related to parliamentary functions.

Recommendation 7
Impose a timeline to proactively disclose mandate letters and revisions to mandate letters, consistent with the timelines currently under the Act.

Recommendation 8
Remove section 91 in order for the Information Commissioner to have jurisdiction over proactively disclosed materials.

Materials newly subject to proactive disclosure

Bill C-58 would require ministers' offices to proactively disclose:

- Minister's briefing materials upon assuming office (within 120 calendar days of appointment);

- the title and tracking numbers of memoranda prepared for the Minister (monthly);
- question period packages prepared by a government institution for the Minister (within 30 calendar days following last sitting day in June and December); and
- briefing materials for parliamentary appearances of the Minister (within 120 calendar days after appearance).

These materials are not currently subject to proactive disclosure by policy.

Currently, requesters can ask for all of these materials under the Act and obtain a response within 30 days (unless a reasonable extension is taken).

Bill C-58 provides timelines for proactive disclosure that are, for the most part, significantly longer than the 30 days to respond to an access request. It also allows institutions to refuse to respond to a request for these materials if they have been made available. The Commissioner is provided no oversight of documents that are to be proactively disclosed, including the application of exemptions. This is a regression of current rights.

Further, this change does not subject ministers' offices to the right of access.

Result: Regression

Materials already subject to proactive disclosure

Bill C-58 would require ministers' offices to proactively disclose:

- expense reports (within 120 days of the end of the fiscal year);
- travel expenses (monthly);
- hospitality expenses (monthly); and
- contracts over $10,000 (quarterly).

These materials are already subject to proactive disclosure policies.Footnote16

Currently, requesters can also ask for all of these materials under the Act.

Bill C-58 allows institutions to refuse to respond to a request for these materials if they have been proactively disclosed and removes the Commissioner's oversight of requests for these materials, including the application of exemptions. This is a regression of current rights.

Result: Regression

Recommendation 9

Subject offices of ministers and ministers of State, and parliamentary secretaries to the right of

access under the *Access to Information Act*, with an exemption for information related to parliamentary functions.

Recommendation 10
Allow requesters to request under the *Access to Information Act* information that has been proactively disclosed by ministers' offices.

Recommendation 11
Subject ministers' offices proactive disclosure obligations to oversight from the Information Commissioner.

Government institutions

Materials newly subject to proactive disclosure

Bill C-58 requires government entities[Footnote17] to disclose:

- The deputy head's (or equivalent's) briefing materials upon assuming office (within 120 calendar days of appointment);
- the title and tracking numbers of memoranda prepared for the deputy head (within 30 calendar days of end of month received); and
- briefing materials for parliamentary appearances of the deputy head (within 120 calendar days after an appearance).

Currently, requesters can ask for all of these materials under the Act and obtain a response within 30 days (unless a reasonable extension is taken).

Bill C-58 provides timelines for proactive disclosure that are significantly longer than the 30 days to respond to an access request. It also allows institutions to refuse to respond to a request for these materials if they have been made available. The Commissioner is provided no oversight of documents that are to be proactively disclosed, including the application of exemptions. This is a regression of current rights.

It also subjects "government entities" to different proactive disclosure rules than "government institutions". This creates an inconsistent disclosure regime across government and means some information will be available under the right of access at some institutions that is not available at others.

Result: Regression

Materials already subject to proactive disclosure

Bill C-58 requires certain government institutions to disclose:

- travel expenses (monthly);
- hospitality expenses (monthly);
- reports tabled in Parliament (within 30 calendar days after tabling); and
- reclassification of positions (quarterly);

It requires government entities to disclose:

- contracts over $10,000 (quarterly); and
- grants and contributions over $25,000 (quarterly).

Currently, requesters can ask for all of these materials under the Act and obtain a response within 30 days (unless a reasonable extension is taken).

Bill C-58 provides timelines for proactive disclosure that are, in some instances, significantly longer than the 30 days to respond to an access request. It also allows institutions to refuse to respond to a request for these materials if they have been made available. The Commissioner is provided no oversight of documents that are to be proactively disclosed, including the application of exemptions. This is a regression of current rights.

Inconsistent 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”.

Result: Regression

Recommendation 12
Subject all “government institutions”, using the definition that is currently found in the Act, to consistent disclosure obligations.

Recommendation 13
Maintain requesters’ right to request under the *Access to Information Act* information that has been proactively disclosed by government institutions.

Recommendation 14
Subject government institutions’ proactive disclosure obligations to oversight from the Information Commissioner.

Materials subject to proactive disclosure

Currently, there are inconsistent proactive disclosure practices across Parliament. For example, senators disclose individual travel details per trip on a quarterly basis, whereas Members of Parliament (MPs (Members of Parliament)) post only an annual summary of travel expenses incurred.

Bill C-58 requires Senators and MPs (Members of Parliament) to disclose:

- travel expenses (90 days after the end of the quarter);
- hospitality expenses (90 days after the end of the quarter); and
- service contracts (all amounts) (90 days after the end of the quarter).

It also requires the bodies that support Parliament to disclose:

- travel expenses (60 days after the end of the quarter);
- hospitality expenses (60 days after the end of the quarter); and
- contracts (over $10,000) (60 days after the end of the quarter).

Currently, Parliament is not covered by the Act. Bill C-58 does not subject Parliament to the right of access.

Under Bill C-58, the timelines for parliamentary bodies to proactively disclose materials are significantly longer than what would be imposed on an institution when responding to an access request under the Act (i.e. 90 or 60 days after the end of the quarter vs. 30 days).

The Commissioner would have no oversight of materials proactively disclosed by Parliament. She could not ensure proactive disclosure timelines are met or oversee whether exemptions are applied appropriately.

Result: Regression

Recommendation 15
Subject the organizations that support Parliament to the right of access under the *Access to Information Act*, with a provision for parliamentary privilege.

Courts

Materials subject to proactive disclosure

The bodies that provide administrative support to the courts have inconsistent proactive disclosure policies and practic

Bill C-58 requires the bodies that provide administrative support to the courts to disclose:

- travel expenses (30 days after the end of the quarter);
- hospitality expenses (30 days after the end of the quarter);
- contracts (over $10,000); (30 days after the end of the quarter); and
- Expenses of superior court judges reimbursed as part of travel, conference, incidental and representational allowances (30 days after the end of the quarter).

Currently, the bodies that provide administrative support to the courts are not covered by the Act. Bill C-58 does not subject these bodies to the right of access.

Under Bill C-58, the timelines for courts administration to proactively disclose materials are significantly longer than what would be imposed on an institution when responding to an access request under the Act (i.e. 30 days after the end of the quarter vs. 30 days).

The Commissioner would have no oversight of materials proactively disclosed by these bodies. She could not ensure proactive disclosure timelines are met or oversee whether exemptions are applied appropriately.

Result: Regression

Recommendation 16
Subject the bodies that provide administrative support to the courts to the right of access under the *Access to Information Act*, with an exclusion to protect judicial independence.

3. Fees

Current situation

Anyone who makes a request for information under the *Access to Information Act* may be required to pay an application fee, not exceeding $25, as prescribed by regulation. The application fee is set at $5 in the Regulations.Footnote18

The Act also allows institutions to charge additional fees in a number of circumstances: for every hour after the first five that they reasonably need to search for records and prepare them for release, for reproducing records, for producing records in alternative formats and for producing

"machine-readable" records. The cost and application of each of these fees are set in the Regulations.Footnote19

In March 2015, the Federal Court determined that institutions could not charge fees to search for and prepare electronic records.Footnote20

In May 2016, the government announced that all fees associated with access to information requests, other than the $5 application fee, were to be waived. This result was achieved through an interim policy change.Footnote21

Recommendation from the Information Commissioner and the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics)

The Commissioner recommended that all fees related to access requests be eliminated.Footnote22

The ETHI committee recommended that the $5 application fee be abolished. It also recommended that consideration should be given to reinstating fees for voluminous requests and for requests that require lengthy research, with the exception of requests for personal information.Footnote23

Bill C-58

Bill C-58 maintains institutions' ability to charge an application fee, not exceeding $25, as may be prescribed by regulation.

It also removes from the Act the list of possible additional fees that can be charged. Instead, it provides that other fees may be prescribed by regulations.

It also maintains the requester's right to complain to the Commissioner about unreasonable fees. The bill clarifies that the Federal Court acts as a second level of review regarding fees.

Analysis

Determining fee amounts and processing fee payments adds complexity to the administration of the access system and results in delays for requesters. Fees have been inconsistently applied across institutions and are dependent on the quality and implementation of information management practices. Institutions use fees to deter requests they consider frivolous, either to narrow requests or to discourage requesters from following through with their requests. The application of fees results in co[illegible]plaints to the OIC (Office of the [illegible]formation Commissioner of

Canada).

Fees are inconsistent with open government principles, including that free access to open data is of significant value to society and the economy.Footnote24

In 2015-16, the government collected $386,390 in fees. Clearly, the inefficiency resulting from the collection of fees outweighs the revenue generated by this collection.

Following the decision by the Federal Court in 2015 and the government's interim directive to waive all fees but the application fee, there was hope that fees related to access requests would be a thing of the past.

Bill C-58 reintroduces fees by removing the list of identified potential additional fees found in the current Act and replacing it by a general statement about fees to be prescribed by regulation. Bill C-58 clearly reopens the door for additional fees to be imposed, beyond the $5 application fee. By leaving the possibility for fees in the Act, the government is sending a contradictory message regarding fees. It is a setback that allows government to revisit its policy decision to eliminate fees.

As Bill C-58 adds a mechanism to deal with requests that are frivolous or made in bad faith, imposing fees for this improper purpose is unnecessary. Fees cause undue delays, lead to abuse, increase costs in the administration of the Act, and are inconsistent with an open by default government. Fees should be definitively eliminated.

Result: Regression

Recommendation 17
Eliminate all fees related to access requests.

4. Strengthening oversight

Oversight model

Current situation

A key element of an access to information regime is independent and effective oversight of government decisions. An effective oversight model assists requesters in obtaining the

information to which they are entitled in a timely manner.

The Act currently uses an ombudsperson model for oversight. Under this model, the Commissioner may investigate a broad range of issues.Footnote25 After concluding an investigation, the Commissioner may issue recommendations to institutions. When an institution does not follow her recommendations, the Commissioner may, with the complainant's consent, apply to the Federal Court. The hearing before the Federal Court is de novo, which means a full review by the Federal Court of the institution's decision to refuse disclosure. Under this model, institutions can bring new grounds to refuse disclosure.

Recommendation from the Information Commissioner and the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics)

The Commissioner recommended adopting an order-making model where the Commissioner can issue an order disposing of the issues raised, with orders subject to judicial review by the Federal Court. This model would include mediation, strong investigative powers, the discretion to adjudicate, publication of orders, and the certification of orders as if they were orders of the Federal Court.Footnote26

The ETHI committee also recommended an order-making model be adopted with clear and rigorously defined parameters.Footnote27

Bill C-58

Bill C-58 introduces a different oversight model. It maintains the Act's ombudsperson approach to investigations, strong investigative powers, and the ability to issue recommendations. It gives the Commissioner the discretion to refuse or cease to investigate, and adds the ability for the Commissioner to issue an "order" on well-founded complaints.Footnote28

When an institution decides not to follow the Commissioner's order, it may apply to the Federal Court.Footnote29 This is not a judicial review of the Commissioner's order. It is a de novo review, which means a full review by the Federal Court of the institution's decision to refuse disclosure. Under this model, institutions can bring new grounds to refuse disclosure.

Analysis

Bill C-58 maintains the majority of the current oversight model. In some instances, it adds procedural steps (e.g., consultation with the Privacy Commissioner), it increases timelines for

investigations (e.g., no timelines for consultation with the Privacy Commissioner, 35 business days for government institution to comply with Commissioner's "order"Footnote30) , and it provides none of the benefits of a true order-making model.

Under an order-making model, an adjudicator receives appeals from requesters regarding an institution's treatment of their access request, including the institution's decision on disclosure. At the conclusion of the adjudication, the Commissioner issues an order disposing of the issues raised in the appeal; this order is binding. This model features a number of benefits:

- It gives a clear incentive to institutions to apply exemptions only where there is sufficient evidence to support non-disclosure and then put this evidence before the adjudicator, as judicial review before the Court is based on the record that was before the adjudicator.
- The grounds on which the order can be set aside by the Court are limited and the institution cannot introduce new evidence or rely on new exemptions, as it is the adjudicator's, and not the institution's, decision that is under review before the Court.
- It avoids the redundancy of having two levels of review of the same decision, which can result in more timely access to information.
- The burden to seek a judicial review before the Court is on institutions, and not requesters, if the institution wishes to oppose the disclosure ordered by an adjudicator.
- It provides finality for requesters because orders of the adjudicator are binding unless reviewed by the Court.

"Orders" under Bill C-58

The government has stated that Bill C-58 would give the Information Commissioner increased powers, including "the ability to order the release of documents."Footnote31 However, the "orders" under the bill lack the hallmarks of an order.

First, in a true order-making model, it is the Commissioner's order that the Court reviews on a judicial review. This means that the record before the Court would be the same as that which was before the Commissioner. The grounds on which the order can be set aside are limited and the institution cannot introduce new evidence or rely on new exemptions.

Under Bill C-58, court review is de novo. Review is not of the Commissioner's "order", but of the government's decision. 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. This is particularly problematic if

institutions wish to delay disclosure. This is a problem under the current Act, and Bill C-58 does nothing to improve it.

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.

Enforceability of "orders"

Second, Bill C-58 would provide no mechanism to have the "orders" certified. This means 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.

Bill C-58 should provide a mechanism to allow an order of the Commissioner to be certified as a judgment or an order of the Federal Court.Footnote32 This ensures enforcement of orders once issued, because contempt proceedings could then be commenced in instances of non-compliance.

Result: Regression

Recommendation 18
Remove section 44.1, de novo review.

Recommendation 19
Amend sections 41-48 of the Act to reflect that it is the Commissioner's order that is under review before the Federal Court.

Recommendation 20
Amend section 36.1 so that any order of the Information Commissioner can be certified as an order of the Federal Court.

Participation of the Privacy Commissioner in investigations

There is currently no obligation imposed on the Information Commissioner to notify, consult with or seek representations from the Privacy Commissioner in the course of an investigation under the Act. Conversely, there is no obligation imposed on the Privacy Commissioner to notify,

consult with or seek representations from the Information Commissioner in the course of an investigation under the *Privacy Act* when the Privacy Commissioner finds that access should not

be given to information withheld by an institution.

Bill C-58 adds two circumstances in which the Privacy Commissioner could become implicated in an access to information investigation:

- In the first circumstance, institutions could notify the Privacy Commissioner as soon as an access complaint is received. This notification would trigger a formal obligation on the Information Commissioner to give the Privacy Commissioner a reasonable opportunity to make representations on the complaint.Footnote33
- In the second circumstance, Bill C-58 would allow the Commissioner to consult, at her discretion, with the Privacy Commissioner when she intends to issue an "order" that personal information be disclosed.Footnote34

Investigations show that the personal information exemption (section 19) is, historically, the most commonly cited exemption.Footnote35 The vast majority of investigations are currently resolved before getting to the stage of issuing recommendations to disclose further information, and in many of these investigations, the complainant indicates during the initial stages of the investigation that they are not complaining about the use of section 19 to withhold information.

The Office of the Information Commissioner has developed over 30 years of expertise in interpreting, analysing, and giving recommendations on the application of section 19 of the Act.Footnote36 In those rare instances where the Information Commissioner and an institution disagree on the application of section 19, the Privacy Commissioner can seek leave of the Federal Court to intervene in a review.Footnote37

This 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. Further, it makes the Information Commissioner dependent on the Privacy Commissioner during an access to information investigation.

Despite the fact that the Privacy Commissioner is not a party to the investigation, Bill C-58 allows him to apply for judicial review of the government institution's decision on access. In a true order-making model, the Privacy Commissioner would need to seek leave from the Court to participate in a judicial review of an access decision.

This amendment is inappropriate, unnecessary, and has the potential to delay investigations and impede even further timely access

Result: Regression

Recommendation 21
Remove notification to, and consultation with, the Privacy Commissioner, the reasonable opportunity for the Privacy Commissioner to make representations during an investigation and the Privacy Commissioner's ability to be an applicant in a judicial review proceeding.

Discretion to adjudicate

Bill C-58 gives the Information Commissioner the ability to refuse or cease to investigate a complaint if the complaint is trivial, frivolous or vexatious or is made in bad faith, or is unnecessary.

This 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.

Result: Positive

Investigative improvements not addressed in Bill C-58

There are two important issues related to the Information Commissioner's investigations that are not addressed in Bill C-58: mediation and the publication of the Commissioner's findings. The addition of these two issues could greatly improve the Commissioner's investigative process.

Mediation

Bill C-58 does not provide for a mediation stage in the Commissioner's investigations. Currently, investigations include mediation between the complainant and the government institution; however, explicit inclusion of a mediation function in the Act would add rigour to the current investigative model. It would put the parties on notice that their full participation is expected, and this, paired with amendment allowing the Commissioner to publish her reports of findings (see below) could result in more efficient and timely investigations.

Result: Positive if added

Recommendation 22
Include a formal mediation function in the course of investigations.

Publication of findings

There is no mechanism in the Act to publish the Commissioner's reports of finding as they are issued. Further, the Information Commissioner is subject to strict confidentiality requirements.Footnote38 The Commissioner may inform the public about her investigations through her annual report to Parliament. The Information Commissioner may also issue special reports to Parliament.

Consequently, there is not a wide body of precedents guiding institutions, requesters and other interested parties. This often results in the same issues being re-investigated needlessly.

To ensure the creation of a body of precedence, the Commissioner should be able to publish her reports of finding.

Result: Positive if added

Recommendation 23
Allow the Information Commissioner to publish reports of finding.

Summary of Recommendations

Current Act	Bill C-58	Proposed improvement
Shall investigate complaint	May disregard complaints made in bad faith	Agree with Bill C-58
Informal mediation	Informal mediation	Formal mediation
Seek representations from parties	Seek representations from parties and Privacy Commissioner	Seek representations from parties
Non-binding recommendation	Non-binding (unenforceable) "order"	Binding (enforceable) order
De novo review	De novo review	Judicial review of Commissioner's order
No publication of findings	No publication of findings	Publication of findings

5. Solicitor-client privilege

Current situation

The *Access to Information Act* provides the Commissioner with strong investigative powers, including the power to review and order the production of records over which institutions have claimed the exemption for solicitor-client privilege.Footnote39

It is important for the Commissioner to be able to receive and review this information. The exemption for solicitor-client privilege is one of the most-claimed exemptions. Investigations of the Office of the Information Commissioner have often resulted in further disclosure of information that was originally withheld under this exemption.

In November 2016, the Supreme Court of Canada (SCC (Supreme Court of Canada)) released its decision in Information and Privacy Commissioner of Alberta v. The Board of Governors of the University of Calgary.Footnote40 In this decision, the SCC (Supreme Court of Canada) determined that Alberta's Information and Privacy Commissioner does not have the power to review records over which solicitor-client privilege is applied.

As the *Access to Information Act*'s provision is similar to Alberta's, the Commissioner wrote to the President of the Treasury Board and the Minister of Justice regarding the implications of this decision and highlighted the differences between the *Access to Information Act* and Alberta's legislation.

She also asked that, for greater certainty, the *Access to Information Act* be amended as part of the government's first phase review of the Act to include language that provides for a clear and unambiguous legislative intent that the Information Commissioner's investigative powers, including her power to compel institutions to produce records, apply to records over which the exemption for solicitor-client privilege has been claimed.

On June 6, 2016, the President of the Treasury Board responded to the Commissioner's letter, confirming that institutions would continue the practice of sharing with the Commissioner records over which they have claimed the exemption for solicitor-client privilege.

Bill C-58

Submit a complaint

Subsection 36(2.1) of Bill C-58 codifies the clear and unambiguous powers of the Commissioner to examine a record that contains information that is subject to solicitor-client privilege if an institution refuses to disclose the record because it claims it is subject to the exemption for solicitor-client privilege.Footnote41 The amendments goes on to state that the Commissioner's examination does not constitute waiver of the privilege.

Analysis

This is a positive amendment in Bill C-58. This amendment 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.

Result: Positive

6. Areas of concern

The purpose of the *Access to Information Act*

Current situation

The purpose of the *Access to Information Act* is to provide a right of access to all records under the control of institutions that are subject to the Act. This general right of access may be restricted when necessary by limited and specific exceptions.Footnote42

The Supreme Court of Canada (the SCC (Supreme Court of Canada)) has held that the overarching purpose of access legislation is to facilitate democracy by helping ensure that citizens have the information they need to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.Footnote43

The SCC (Supreme Court of Canada) has also determined that the right of access has quasi-constitutional status in Canada.Footnote44 The right of access also derives from section 2(b) of the Canadian Charter of Rights and Freedoms (the right of free expression), where access to government information is a necessary precondition of meaningful expression on the functioning of government.Footnote45

Recommendation from the Information Commissioner and the ETHI Committee/Standing Committee on Access to

Information, Privacy and Ethics)

Neither the Commissioner nor the ETHI committee recommended amending the purpose clause of the Act.

Bill C-58

Bill C-58 amends the purpose clause of the Act. It states that the new purpose of the 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."Footnote46

The text of the old purpose clause is maintained as a secondary purpose, to be used in furtherance of this new, primary purpose.

Analysis

The purpose clause of a statute animates the principles on which a statute is based and facilitates its interpretation. It sets out the objective or goal that the legislation is aiming to achieve. According to the principles of statutory interpretation, any change to the purpose clause may signal a change in meaning.Footnote47

The current purpose has been interpreted to apply to government as a whole, including the accountability of politicians and bureaucrats. Bill C-58 could lead to a more restrictive interpretation of the entire Act, and could result in less disclosure of information to requesters. This amendment raises several questions, some with constitutional implications:

1. What is the impact of subsuming the current purpose clause under the new purpose clause? Will it lead to a more restrictive interpretation of the Act?
2. Will this impact the analysis of disclosure of information where it is in the public interest? Footnote48 This analysis requires taking into account the purpose of the Act.
3. Will this impact an institution's analysis when applying discretionary exemptions? The purpose of the Act is a relevant factor that must be considered in the exercise of discretion.
4. Has a constitutional analysis of this amendment been conducted by Department of Justice officials to understand how this change may impact the right of access's quasi-constitutional status?Footnote49

This change to the purpose clause is unnecessary and could affect the interpretation of the Act as a whole.

Result: Unknown

Recommendation 24
Remove the amendments to the purpose clause.

Transition to the new oversight model

If Bill C-58 is passed, most parts of the bill would become effective immediately. For example, the amendments to section 6 limiting the scope of requests become effective right away. Institutions can also decline requests immediately.

However, 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.

Analysis

Bill C-58 does not significantly amend the investigation process currently in place. Furthermore, it does not change the reasons for withholding information; the exemptions and exclusions in the Act remain the same. Nor does it shift the burden of proof; institutions who resist disclosure must still establish that the information falls within one of the exceptions. A transition period is unnecessary.

In addition, a transition could have a number of negative consequences.

The most problematic is that the OIC (Office of the Information Commissioner of Canada) could have two concurrent investigation systems running at the same time, potentially for a number of years: 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.

2016–2017 ended with 2,863 open complaints in the OIC (Office of the Information Commissioner of Canada)'s inventory. It seems unlikely that in one year, all new and backlog complaints will be resolved in time to transition to the new oversight model with a clean slate.

There are operational and costs issues associated with having two concurrent investigation systems running. There will need to be complementary staff, training and procedures for each system.

This will also impact institutions, who will have to deal with two different investigation processes depending of the timing of the complaint.

It also impacts requesters' rights. Once the bill is passed, 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.

A transition period is unnecessary. The new oversight model should be effective for all complaints that are before the Information Commissioner at the time that Bill C-58 becomes law.

Result: Regression

Recommendation 25
Subject all complaints to the new oversight model at the same time, regardless of when the complaint was received.

Mandatory periodic review of the Act

Current situation

The Act does not currently require that it be reviewed periodically.

Recommendation from the Information Commissioner and the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics)

The Commissioner and the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics) recommended a mandatory parliamentary review of the Act every five years, with a report tabled in Parliament.Footnote50

Bill C-58

Bill C-58 requires the Designated Minister, in this case, the President of the Treasury Board, review the Act within one year after the bill is passed and every five years thereafter.

The Minister must table a report in the House of Commons and Senate at the end of this review. This report will then be referred to a committee.

Analysis

Bill C-58 provides for 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

What is proposed in Bill C-58 is atypical for legislative review clauses and gives no deadline for when the government's review should be completed.Footnote51

Result: Unknown

Recommendation 26
There should be mandatory parliamentary review of the *Access to Information Act*.

The end of Info Source

Current situation

Section 5 of the Act currently requires institutions to publish certain information about their organization each year, including descriptions of:

- the institution and its responsibilities;
- all classes of records under their control; and
- all manuals used by their employees.

This information is known as Info Source.Footnote52

Recommendation from the Information Commissioner and the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics)

Neither the Commissioner nor the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics) recommended the removal of Info Source.

Bill C-58

Bill C-58 removes from the Act institutions' obligations to publish Info Source. It would only require institutions to publish the title and address of the person to whom access requests should be made.

Analysis

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.

Without knowledge about an institution's information holdings, found through a resource like Info Source, requesters will have increased difficulty meeting the new requirements found in the

new section 6 of Bill C-58.

Result: Regression

Recommendation 27
Remove the amendment to section 5.

Institutions' annual reports on the administration of the *Access to Information Act*

Current situation

Currently under the Act, institutions are required to publish an annual report on their administration of the *Access to Information Act*. This report must be tabled within three months after the end of the fiscal year.Footnote53

Recommendation from the Information Commissioner and the ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics)

The Commissioner recommended that government report statistics on the administration of the *Access to Information Act* on a quarterly basis, in an easy to re-use format.Footnote54

The ETHI Committee (Standing Committee on Access to Information, Privacy and Ethics) did not make a recommendation on this issue.

Bill C-58

Bill C-58 extends the timeline for tabling this report to any of the first 15 parliamentary sitting days after September 1, an extension of at least two and half months.

Analysis

Institutions' annual reports on the administration of the *Access to Information Act* provide a window into the health of the access to information system.

They allow Canadians, the Commissioner, Parliament and the President of the Treasury Board — who is responsible for the administration of the Act—to assess the performance of the access to

information system.

The majority of institutions already upload their access to information statistics onto a centralised system that is overseen by Treasury Board Secretariat (TBS (Treasury Board of Canada Secretariat)). This data is available for TBS (Treasury Board of Canada Secretariat) to access as needed. This information should be available on a quarterly basis in an open and reusable format.

Result: Regression

Recommendation 28
Statistics to assess the performance of the access to information system should be available on a quarterly basis in an open and reusable format.

List of Recommendations

Chapter 1: The right of access

Recommendation 1
Remove the amendments to section 6.

Recommendation 2
Remove paragraph 6.1(1)(a).

Recommendation 3
Remove paragraph 6.1(1)(b).

Recommendation 4
Remove paragraph 6.1(1)(c).

Recommendation 5
Keep paragraph 6.1(1)(d).

Chapter 2: Coverage of ministers' offices, Parliament and courts

and courts

Recommendation 6

Subject the Prime Minister's Office to the right of access under the *Access to Information Act*, with an exemption for information related to parliamentary functions.

Recommendation 7

Impose a timeline to proactively disclose mandate letters and revisions to mandate letters, consistent with the timelines currently under the Act.

Recommendation 8

Remove section 91 in order for the Information Commissioner to have jurisdiction over proactively disclosed materials.

Recommendation 9

Subject offices of ministers and ministers of State, and parliamentary secretaries to the right of access under the *Access to Information Act*, with an exemption for information related to parliamentary functions.

Recommendation 10

Allow requesters to request under the *Access to Information Act* information that has been proactively disclosed by ministers' offices.

Recommendation 11

Subject ministers' offices proactive disclosure obligations to oversight from the Information Commissioner.

Recommendation 12

Subject all "government institutions", using the definition that is currently found in the Act, to consistent disclosure obligations.

Recommendation 13

Maintain requesters' right to request under the *Access to Information Act* information that has been proactively disclosed by government institutions.

Recommendation 14

Subject government institutions' proactive disclosure obligations to oversight from the Information Commissioner.

Recommendation 15

Subject the organizations that support Parliament to the right of access under the *Access to*

Information Act, with a provision for parliamentary privilege.

Recommendation 16

Subject the bodies that provide administrative support to the courts to the right of access under the *Access to Information Act*, with an exclusion to protect judicial independence.

Chapter 3: Fees

Recommendation 17

Eliminate all fees related to access requests.

Chapter 4: Strengthening oversight

Recommendation 18

Remove section 44.1, de novo review.

Recommendation 19

Amend sections 41-48 of the Act to reflect that it is the Commissioner's order that is under review before the Federal Court.

Recommendation 20

Amend section 36.1 so that any order of the Information Commissioner can be certified as an order of the Federal Court.

Recommendation 21

Remove notification to, and consultation with, the Privacy Commissioner, the reasonable opportunity for the Privacy Commissioner to make representations during an investigation and the Privacy Commissioner's ability to be an applicant in a judicial review proceeding.

Recommendation 22

Include a formal mediation function in the course of investigations.

Recommendation 23

Allow the Information Commissioner to publish reports of finding.

Chapter 5: Solicitor-client privilege

No recommendation.

Chapter 6: Areas of concern

Recommendation 24

Remove the amendments to the purpose clause.

Recommendation 25

Subject all complaints to the new oversight model at the same time, regardless of when the complaint was received.

Recommendation 26

There should be mandatory parliamentary review of the *Access to Information Act*.

Recommendation 27

Remove the amendment to section 5.

Recommendation 28

Statistics to assess the performance of the access to information system should be available on a quarterly basis in an open and reusable format.

Comparative Summary				
Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Chapter 1: The right of access				
Making requests	Provide sufficient detail so that experienced employee can identify record with reasonable effort Institutions have duty to assist	No amendment	No amendment	Must provid 1. Specific subject r 2. Type of r 3. Period fc which re is reques

Comparative Summary	Submit a complaint

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Declining to act on requests	Institutions cannot decline to act on requests	Only refuse requests that are frivolous, vexatious or an abuse of the right of access (recommendation 2.4)	Only refuse requests that are frivolous, vexatious or an abuse of the right of access (recommendation 12)	Decline to a requests because: • reques not incl enough details • person already given a or can access other m or • the volu of page searchi through volume pages unreas interfer with operati
Declining to act on requests	Institutions cannot decline to act on requests	Only refuse requests that are frivolous, vexatious or an abuse of the right of access (recommendation 2.4)	Only refuse requests that are frivolous, vexatious or an abuse of the right of access (recommendation 12)	Decline to a requests be it is vexatiou made in bac or is otherw abuse of the to make a re
Comparative Summary				

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Chapter 2: Coverage of ministers' offices, Parliament and courts				
The Prime Minister's Office (PMO (Prime Minister's Office)) and mandate letters	The PMO (Prime Minister's Office) is not subject to the Act	Cover the PMO (Prime Minister's Office) under the Act (recommendation 1.2)	Extend the Act to include the PMO (Prime Minister's Office) (recommendation 3)	Proactively disclose ma letters and revisions to mandate let No timeline disclose Commissior has no over of proactive disclosed materials
Comparative Summary				

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Ministers' offices	Ministers' offices are not covered by the Act Some records located in ministers' offices may be subject to the Act (two-part control test) Policies impose proactive disclosure obligations	Cover ministers' offices under the Act, with an exemption for information related to parliamentary functions (recommendations 1.2 and 1.3)	Extend the Act to include ministers' offices, with an exclusion for information related to parliamentary functions (recommendation 3)	Proactive disclosure obligations ministers' of Proactive disclosure timelines lo than 30 day respond to a request (unl reasonable extension is taken) Requests fo proactively disclosed materials ca declined Commissior has no over of proactive disclosed materials

Comparative Summary

Submit a complaint

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Government institutions	Government institutions are covered by the Act Policies impose proactive disclosure obligations	More proactive disclosure obligations for government institutions (recommendations 6.1-6.4)	More proactive disclosure obligations for government institutions (recommendations 27, 28 and 30)	More proact disclosure obligations government institutions government entities Proactive disclosure timelines lo than 30 day respond to request (unl reasonable extension is taken) Requests fo proactively disclosed materials ca declined Commissior has no over of proactive disclosed materials
Comparative Summary				

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Parliament	Bodies that provide administrative support to Parliament are not covered by the Act	Cover the bodies that provide administrative support to Parliament under the Act, with an provision to protect against infringements of parliamentary privilege (recommendations 1.4-1.5)	Extend the Act to include organizations that support Parliament, with a provision to prevent any infringement of parliamentary privilege (recommendations 4-5)	Proactive disclosure obligations for MPs (Members o Parliament), Senators an bodies that provide administrati support to Parliament Proactive disclosure timelines lo than 30 day respond to a request (unl reasonable extension is taken) Commissior has no over of proactive disclosed materials

Comparative Summary

Submit a complaint

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Courts	Bodies that provide administrative support to the courts are not covered by the Act	Cover the bodies that provide administrative support to the courts under the Act, with an exclusion to protect judicial independence (recommendations 1.6-1.7)	Extend the Act to include bodies that provide administrative support to the courts, with an exclusion to protect judicial independence (recommendation 9)	Proactive disclosure obligations bodies that provide administrati support to t courts Proactive disclosure timelines lo than 30 day respond to request (unl reasonable extension is taken) Commissior has no over of proactive disclosed materials
Chapter 3: Fees				

Comparative Summary	Submit a complaint

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Fees	$5 application fees Search and preparation fees for non-computerized records (after the first five hours) Reproduction fees Fees for producing records in alternative formats Fees for producing "machine-readable" records By interim policy: charge no fees but $5 application fee	Eliminate all fees (recommendation 3.10)	Abolish $5 application fee Consider reinstating fees for voluminous requests and for requests that require lengthy research, with the exception of requests for personal information (recommendation 14)	Maintains application (up to $25) Allows addi fees to be a by regulatio
Chapter 4: Strengthening oversight				
Comparative Summary				

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Oversight model	Ombudsperson model Commissioner issues recommendations De novo review before court	Order-making model Orders subject to judicial review Certification of orders (recommendations 5.1 and 5.4)	Order-making model with clear and rigorously defined parameters (recommendation 25)	Maintains m of current m Adds steps investigatio process De novo rev before cour Commissior can issue "o but these ar certifiable Provides no the benefits true order-making mo
Comparative Summary				

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Seeking representations from Privacy Commissioner	No obligation to notify, consult with or seek representations from the Privacy Commissioner in the course of an investigation	No recommendation	No recommendation	Adds two circumstanc where Priva Commissior could be implicated i investigatio 1. Where institutio notifies Privacy Commis of acces complai 2. Where Informat Commis consults Privacy Commis when intendin issue "or that pers informat disclose

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Mediation	No explicit mediation function in Act; although mediation is often a part of investigations	Act should provide for the explicit authority to resolve appeals by mediation (recommendation 5.3)	No recommendation	Does not pr for mediatic
Publication of orders	Strict confidentiality requirements prevent routine publication of reports of finding Annual and special reports to Parliament	Recommended true order-making model would allow for publication of orders (recommendation 5.1)	Recommended true order-making model would allow for publication of orders (recommendation 25)	No mechan publish repo finding
Chapter 5: Solicitor-client privilege				
Comparative Summary				

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Examination of solicitor-client privileged records	Act needs to make clear that the Information Commissioner can examine records over which the exemption for solicitor-client privilege has been claimed	In a letter to ministers, the Commissioner recommended Act be amended to give clear and unambiguous legislative intent that the Commissioner's investigative powers, including her power to compel institutions to produce records, apply to records over which the exemption for solicitor-client privilege has been claimed	No recommendation	Provides tha Commissior may examin record that contains information subject to solicitor-clie privilege if a institution re to disclose t record beca is subject to exemption f solicitor-clie privilege
Chapter 6: Areas of concern				
Comparative Summary				

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
The purpose of the *Access to Information Act*	The purpose of the Act is to provide a right of access to all records under the control of institutions Act facilitates democracy Right of access has quasi-constitutional status	No amendment to purpose	No amendment to purpose	Amends the purpose of t Act "to enha the account and transpa of federal institutions i order to pro an open and democratic society and enable publ debate on tl conduct of t institutions" Old purpose maintained furtherance new purpos
Transition to new oversight model	N/A	No recommendation	No recommendation	Parts of Bill related to complaints investigatio not become effective for year and wil be applicab those comp received aft that effectiv
Comparative Summary				

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Mandatory periodic review	No mandatory periodic review in Act	Parliamentary review of Act every 5 years (recommendation 8.1)	Parliamentary review of Act every 5 years (recommendation 31)	Governmen review of Ac year after Bi 58 comes ir force, then e five years thereafter, w report table Parliament No timeline complete re
Info Source	Institutions are required to annually publish certain classes of information (known as Info Source)	No recommendation to remove Info Source	No recommendation to remove Info Source	Removes In Source obligations than publica of the title a address of t person to w access requ should be m

Comparative Summary

Submit a complaint

Topic	Current Situation	Modernization Report Recommendation	ETHI Recommendation	Bill C-58
Annual reports on the administration of the *Access to Information Act*	Institutions are required to table an annual report on administration of Act within three months after the end of the fiscal year	No recommendation	No recommendation	Extends the to table rep any of the fi parliamenta sitting days September

Footnotes

Footnote 1

Office of the Information Commissioner, Striking the Right Balance for Transparency: Recommendations to Modernize the *Access to Information Act*, (March 2015): http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization- report.aspx; Parliament of Canada, Review of the *Access to Information Act*: Report of the Standing Committee on Access to Information, Privacy and Ethics, (June 2016): http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2/.

Return to footnote1referrer

Footnote 2

section 6.

Return to footnote2referrer

Footnote 3

subsection 4(2.1).

Return to footnote3referrer

Footnote 4

Office of the Information Comm sioner, Striking the Right Balanc for Transparency,

Recommendation 2.4, (March 2015): http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_4.aspx#fnb9; Parliament of Canada, Review of the *Access to Information Act*, Recommendation 12, (June 2016): http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2/page-66#14

Return to footnote4referrer

Footnote 5

New subsection 6.1(1) reads as follows:

Reasons for declining to act on request

6.1 (1) The head of a government institution may, before giving a person access to a record or refusing to do so, decline to act on the person's request if, in the opinion of the head of the institution,

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.

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Footnote 6

For this reason, the Commissioner recommended in her report to modernize the Act that the exclusion for published material be replaced with a discretionary exemption that would allow institutions to refuse to disclose information that is reasonably available to the requester.

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Footnote 7

Per section 91.

Return to footnote7referrer

Footnote 8

Per paragraph 9(1)(a). The Commissioner makes several recommendations in her report to modernize the Act to address a culture of delay across institutions and improve timeliness, including recommendations to the extension provisions. The ETHI committee also made one

recommendation to improve timeliness (limiting the length of extensions), but did not hear enough testimony on the Commissioner's other recommendations to be able to form an opinion

at that time. See Recommendations 3.1–3.3, (March 2015): http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_5.aspx#1_1; Recommendation 16, (June 2016): http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2/page-78#17

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Footnote 9

Government of Canada, Access to Information Manual, "Section 9 of the Act – Extension of time limits": https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha7_3. In addition, the OIC considers the following factors during extension investigations to assess what constitutes a search through a large number of records: commonality and currency of the formats of the records; degree of ease in reviewing and assessing the relevancy of the records; existence of previous requests for the same or similar records; number of records management systems to be searched; number of officials involved in the search; and accessibility of the records. Office of the Information Commissioner, Advisory Notice – Time Extensions Pursuant to Paragraph 9(1)(a) of the *Access to Information Act*: http://www.oic-ci.gc.ca/eng/avis-information-advisory-notice-9-1-a-2016.aspx.

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Footnote 10

Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25.

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Footnote 11

The first step of the two-part control test is to ask whether the record relates to a departmental matter. When it does not, that ends the inquiry. When the record does relate to a departmental matter, the second step is to determine whether, based on all relevant factors, a senior official of the institution should reasonably expect to be able to obtain a copy of the record upon request. Relevant factors include the substantive content of the record, the circumstances in which the record was created and the legal relationship between the institution and the record holder. In Accountable Government: A Guide for Ministers and Ministers of State, the Privy Council Office explains that "records kept in the offices of Ministers and Ministers of State must be broken down into four categories: Cabinet documents, institutional records, ministerial records, and personal and political records." Canada, Privy Council Office, Accountable Government: A Guide for Ministers and Ministers of State, (Ottawa: Privy Council Office, 2011) at p. 29. http://www.pco-bcp.gc.ca/docs/information/publications/ag-gr/2011/docs/ag-gr-eng.pdf.

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Footnote 12

Office of the Information Commissioner, Striking the Right Balance for Transparency, Recommendations 1.2–1.3, (March 2015): http://www.oic-ci.gc.ca/eng/rapport-de-

modernisation-modernization-report_3.aspx#1

Return to footnote12referrer

Footnote 13

Parliament of Canada, Review of the *Access to Information Act*, Recommendation 3, (June 2016): http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2/page-45#8

Return to footnote13referrer

Footnote 14

See the mandate of letter to the President of the Treasury Board, who was directed to review the Act to ensure it "applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts", as well as public appearances from the President of the Treasury Board at the Open Dialogue Forum and before the ETHI committee. Prime Minister of Canada, "President of the Treasury Board of Canada Mandate Letter", (November 2015): http://pm.gc.ca/eng/president-treasury-board-canada-mandate-letter; Government of Canada, "Speaking notes for the Honourable Scott Brison, President of the Treasury Board to the Canadian Open Dialogue Forum 2016", (March 31, 2016): https://www.canada.ca/en/treasury-board-secretariat/news/2016/03/speaking-notes-for-the-honourable-scott-brison-president-of-the-treasury-board-to-the-canadian-open-dialogue-forum-2016.html; ETHI Committee Meeting, Evidence, (May 5, 2016): http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/meeting-12/evidence.

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Footnote 15

Section 91 states the following:

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 that Part in respect of any matter relating to this Part, including

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

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Footnote 16

For example, ministers, ministers of state, parliamentary secretaries, and their exempt staff must proactively disclose all travel and hospitality expenses. Treasury Board of Canada Secretariat. "Policies for Ministers' Offices," (January 17, 2011): http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/mg-ldm/2011/pgmo-pldcmpr-eng.asp?format=print.

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Footnote 17

The term "government entity" is used in Part 2 of Bill C-58 in addition to "government institutions". A "government institution" under the *Access to Information Act* is any department or ministry of state of the Government of Canada or any body or office listed in Schedule I of the *Access to Information Act*, as well as any parent Crown Corporation or wholly owned subsidiary per section 83 of the *Financial Administration Act*. A "government entity" is any government department named in Schedule I of the *Financial Administration Act*, a division or branch of the federal public administration set out in column I of Schedule I.1 of the *Financial Administration Act* or a corporation named in Schedule II of the *Financial Administration Act*.

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Footnote 18

Subsection 11(1)(a) and 7(1)(a), respectively.

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Footnote 19

Section 11.

Return to footnote19referrer

Footnote 20

Information Commissioner of Canada v. Attorney General of Canada, 2015 FC 405.

Return to footnote20referrer

Footnote 21

Government of Canada, Interim Directive on the Administration of the *Access to Information Act* (May 5, 2016): http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18310

Return to footnote21referrer

Footnote 22

Office of the Information Commissioner, Striking the Right Balance for Transparency, Recommendation 1.7, http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_3.aspx#1

Return to footnote22referrer

Footnote 23

Parliament of Canada, Review of the *Access to Information Act*, Recommendation 14, http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2/page-72#16

Return to footnote23referrer

Footnote 24

G8, Open Data Charter: (June 18, 2013), https://www.gov.uk/government/publications/open-

data-charter/g8-open-data-charter-and-technical-annex

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Footnote 25

Section 30(1)(f) provides that the Commissioner may investigate any matter relating to requesting or obtaining access to government-held records. In addition, sections 30(1)(a)–(e) provide that she may receive and investigate complaints from (a) persons who have been refused access to a record requested under this Act or a part thereof; (b) from persons who have been required to pay a fee that they consider unreasonable; (c) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable; (d) from persons who have not been given access to a record or a part thereof in the official language requested by the person or have not been given access in that language within a period of time that they consider appropriate; (d.1) from persons who have not been given access to a record or a part thereof in an alternative format or have not been given such access within a period of time that they consider appropriate; (e) and in respect of any publication or bulletin institutions are required to publish as per section 5.

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Footnote 26

Office of the Information Commissioner, Striking the Right Balance for Transparency, Recommendations 5.1–5.11: http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_7.aspx.

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Footnote 27

Parliament of Canada, Review of the *Access to Information Act*, Recommendation 25, (June 2016): http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2/page-105.

Return to footnote27referrer

Footnote 28

Orders can be made regarding refusals of access, an institution's decision to decline a request, an unreasonable fee or time extension, and format and language issues. Orders cannot be made for complaints she initiates, or any other matter.

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Footnote 29

There is no mechanism for enforcement of the Commissioner's order in Bill C-58, in the event that an institution neither follows the Commissioner's order nor applies for judicial review. See Enforceability of "orders", below.

Return to footnote29referrer

Footnote 30

30 business days plus 5 business days for receipt of Commissioner's report. 40 business days plus 5 business days for receipt of Commissioner's report in investigations involving third parties. Bill C-58, s. 36.1(4).

Return to footnote30referrer

Footnote 31

Government of Canada, New Release, "Government of Canada tables the most comprehensive reform of Access to Information in a generation", (June 19, 2017): https://www.canada.ca/en/treasury-board-secretariat/news/2017/06/government_of_canadaintroducesreformstoaccesstoinformation.html

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Footnote 32

See for example s. 59.01 of British Columbia's access law or s. 72(6) of Alberta's.

Return to footnote32referrer

Footnote 33

Section 35(2)(d).

Return to footnote33referrer

Footnote 34

Section 36.2.

Return to footnote34referrer

Footnote 35

It accounted for 52.2% of all refusal complaints in 2016-17, 55.6% in 2015-16, 52.9% in 2014-15 and 45% in 2013-14.

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Footnote 36

In his study on the possible merger between the Offices of the Information and Privacy Commissioners, former Justice of the Supreme Court of Canada, Gerard V. La Forest, acknowledged that although it was possible that the values relating to access to information and those relating to privacy are sometimes in conflict, the frequency and importance of these conflicts had been overstated.

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Footnote 37

Since 1983, the application of section 19 of the ATIA was raised before various courts in 62 cases. The Information Commissioner was involved in about 53% of these cases. In contrast, the Privacy

Commissioner was involved in 11%. The two commissioners were involved together in only four cases, taking opposite positions in two of them.

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Footnote 38

The *Access to Information Act* requires that every investigation by the Information Commissioner is conducted in private (subsection 35(1)). During an investigation, the Information Commissioner may only disclose information:

- when it is necessary to carry out an investigation or establish the grounds for her findings, recommendations and orders (paragraphs 63(1)(a)(i) and (ii));
- in the course of a prosecution for an offence under the *Access to Information Act*, a prosecution for an offence under section 131 of the Criminal Code (perjury) in respect of a statement made under the Act, a review before the Federal Court under the Act or an appeal (section paragraph(1)(b)); or
- to the Attorney General of Canada when, in the Commissioner's opinion, she has evidence relating to the commission of an offence against a law of Canada or a province by a director, officer or employee of a government institution (subsection 63(2)).

Once an investigation is complete, the Information Commissioner must provide a report that sets out the results of her investigation and any recommendation to the complainant and any third parties entitled to make representations. In addition, when a complaint is well founded, the Commissioner must, prior to reporting her findings to the complainant, provide the institution with her findings and any recommendations for resolving the complaint.

The Commissioner may inform the public about her investigations through her annual report to Parliament. She may also issue special reports that can be tabled in Parliament at any time; however, they must be related to an important or urgent matter within the scope of the Commissioner's assigned powers, duties and functions.

Bill C-58 does not significantly amend these sections.

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Footnote 39

Section 36.

Return to footnote39referrer

Footnote 40

2016 SCC 53.

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Footnote 41

The amendment also applies to a record that contains information that is subject to the

professional secrecy of advocates and notaries and litigation privilege. A similar amendment is made to clarify that the Federal Court may review these records.

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Footnote 42

Section 2. The purpose section also requires that decisions on disclosure should be reviewed independently of government. The Commissioner and the courts provide this independent oversight. It also explains that the *Access to Information Act* is intended to complement and not replace existing procedures for accessing government information. The Act is not intended to limit in any way access to the type of government information that is normally available to the general public.

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Footnote 43

Dagg v. Canada (Minister of Finance), [1997] 2 SCR (Supreme Court Reports)abbr> 403 at para. (paragraph) 61.

Return to footnote43referrer

Footnote 44

Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC (Supreme Court of Canada) 25 at para. (paragraph) 40.

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Footnote 45

See Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC (Supreme Court of Canada) 23 at para. (paragraph) 30, where the SCC (Supreme Court of Canada) states that "[s]ection 2(b) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government."

Return to footnote45referrer

Footnote 46

Section 2.

Return to footnote46referrer

Footnote 47

Ruth Sullivan, Statutory Interpretation: Second Edition (2007), Irwin Law Inc, Toronto. See chapter 10: Purposive Analysis.

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Footnote 48

Such as under paragraph 8(2)(m) of the *Privacy Act* or subsection 20(6) of the *Access to Information Act*.

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Footnote 49

On September 20, 2017, the Minister of Justice tabled a Charter Statement on Bill C-58. The statement deals exclusively with how the bill's proactive disclosure regime could impact charter rights. It does not discuss how the amendments to the purpose clause impact the right of access and section 2(b) of the Charter. Government of Canada, 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, (September 20, 2017): http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c58.html

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Footnote 50

Office of the Information Commissioner, Striking the Right Balance for Transparency, Recommendation 8.1, (March 2015): http://www.oic- ci.gc.ca/eng/rapport-de-modernisation-modernization-report_10.aspx; Parliament of Canada, Review of the *Access to Information Act*, Recommendation 31 (June 2016): http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2/page-120

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Footnote 51

For example, British Columbia's access law, as well as the Federal *Lobbying Act* and the *Conflict of Interest Act*, all mandate that periodic legislative review should be conducted by a committee of the Legislative Assembly or parliamentary committee. These laws also have a one year timeline to complete the review.

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Footnote 52

Treasury Board of Canada Secretariat, "Information about programs and information holdings": https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/information-about-programs-information-holdings.html

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Footnote 53

Per section 72.

Return to footnote53referrer

Footnote 54

Recommendation 4.4, "Letter to the President of the Treasury Board on Action Plan 2.0 from the Information Commissioner of Canada", (November 4, 2014): http://www.oic-ci.gc.ca/eng/lettre-plan-d-action-2.0_letter-action-plan-2.0.aspx

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