SUBMISSIONS TO

House of Commons Standing Committee
on
Justice and Legal Affairs

RE

Bill C-43
The Accessibility of Government Information
and
The Protection of Personal Information

FROM

The Canadian Civil Liberties Association

DELEGATION

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I N D E X

INTRODUCTION

The Canadian Civil Liberties Association is a national organization with a cross-country membership of more than five thousand individuals, eight affiliated chapters, and some thirty groups which in turn represent several thousands of people. The membership is drawn from all walks of life including lawyers, professors, trade unionists, housewives, media performers, writers, etc.

Essentially, CCLA objectives are two-fold:

- to promote fair procedures in the determination of government policy and the resolution of people's grievances
- to promote legal safeguards against the unreasonable invasion by public authority of the freedom and dignity of the individual.

It is not difficult to appreciate the relationship between these objectives and Bill C-43. Without adequate access to government information, many claimants could not effectively enforce their legal rights. Nor could the public at large effectively influence government policy. On the other hand, much of the information in the hands of government relates to individual citizens. Excessive access to such information can denude those citizens of their effective privacy.

In this regard, it is appropriate for the Canadian Civil Liberties Association to welcome the appearance of Bill C-43. The proposed protections for access and privacy represent an important contribution to the civil liberties of the Canadian people. Not the least of the Bill's important features are its provisions for challenging and overruling governmental decisions in these areas.

Inevitably, of course, the claims to access and privacy will come into conflict with various other public interests. And, just as inevitably, they will even conflict with each other. In our view, Bill C-43 does not strike a sufficiently reasonable balance among these competing interests. Nor are its provisions for administration, enforcement, and review as effective as they might be. Our ensuing submissions are directed, therefore, toward achieving a more equitable equilibrium of the interests in conflict and more viable remedies for the individuals involved.

The Preference for Harms-Test Over Class-Test Exemptions

Compared to harms-test exemptions, class-test exemptions are more readily discernible by objective standards. At the same time, however, they are more susceptible to the problem of overbreadth. It is not possible, of course, to identify with precision every document - past, present, or future - which can legitimately be exempted from public access. Of necessity, the language used must be generic. Yet, the more generic it is, the more it will include.

In order for the right of public access to work, therefore, it is preferable, where possible, to move from class-tests to harms-tests. Better to risk some subjectivity than to court such overbreadth. The factor of subjectivity can be mitigated by the interplay of the claimant, the government, the Information Commissioner, and the courts. The factor of overbreath is not capable of such mitigation. So long as the words allow the exemption of a document, that ends the matter. No matter how trivial its contents, the government cannot be ordered to release it. To whatever extent, therefore, class-test exemptions can be reduced, a freedom of information statute will be improved.

Even where the Bill does employ harms-tests, we note the relative absence of references to amounts or levels of harm. Under many of these exemptions, virtually any anticipated injury would appear sufficient to permit the withholding of the requisite information from public access. It is not hard to imagine that there will be many situations where the anticipated harm caused by disclosure would be trivial by comparison to the potential benefits. At the very least, in our view, this legislation should make some attempt to measure the harm involved. While it is recognized, of course, that precision about these matters is impossible, some descriptive terminology, however imprecise, would convey to the adjudicators that trivial or minimal injuries will not suffice to withhold information from the public. In this connection, perhaps the word "significant" will achieve the contemplated objective.

Reducing the Number of Class-Test Exemptions

An excellent candidate for the reduction of class-test exemptions is to be found in Section 16(1) dealing with law enforcement. Why should any or all information be exempted simply because it is "obtained...in the course of investigations pertaining to...the enforcement of any law of Canada or a province"? Suppose, for example, an environmental enforcement investigation were to uncover mercury or asbestos contamination? Why should there be a discretion to deprive the public of such vital information? Is this exemption sufficiently broad that it could also empower the withholding of even statistical information?

It is one thing, of course, to withhold the foregoing categories of information in circumstances where their disclosure could reasonably be expected to harm some law enforcement investigation. But, as these examples strongly suggest, there would be many circumstances where no such harm could reasonably be anticipated. In view of such considerations, we would recommend that a harms test be required in all of the law enforcement exemptions.

Sections 14 (federal-provincial relations), 15 (defence, international affairs, etc.), and 16(2) (aids to crime), combine a harms-test with a class-test. They empower the withholding of information which "could reasonably be expected to be injurious" to these interests. But then they go on to list, for exemption, a number of classes of information without requiring any assessment of harm. Again, the list of class-test exemptions may incur the risk of overbreadth. Note, for example, the Section 15 exemption for "information relating to the quantity, charcteristics...of weapons". Should the government be able to deny the public such information under any and all circumstances? It is not difficult to anticipate, of course, numbers of situations where the release of such data would truly harm the defence of our country. But there could also be occasions where such disclosures would not hurt our defences at all; indeed, the consequent public scrutiny might be helpful to them.

Accordingly, the classes enumerated in Sections 14, 15, and 16(2) should not automatically be entitled to exemption. Rather they should be treated simply as illustrations of what might reasonably be regarded as injurious to the

interests at issue. As illustrations, however, they would be supportive, not conclusive, of governmental claims for exemption. In our view, such an approach would strike a much better balance than the kind of overbroad class-test which the Bill now provides.

Similar considerations might be applied to the Section 18 exemptions dealing with anticipated harm to Canadian economic interests. Section 18(a) would exempt a range of economic information simply because it has "substantial value or is reasonably likely to have substantial value". This proposed exemption contains no reference whatever to anticipated harm or to an undue benefit. In the absence of such apprehended consequences, there is no valid basis to include this exemption.

Section 18(c) contains a harms-test but, like Sections 14, 15, and 16(2), it goes on to list for exemption a number of classes of information without requiring any assessment of harm. While the disclosure of such "contemplated" transactions might often damage the country's economic interests, it is difficult again to believe that this would always be the case. It is quite conceivable, for example, that the disclosure of some contemplated acquisitions of property would serve to discourage certain foolish extravagances. We would propose, therefore, that the classes enumerated in Section 18(c) be treated along the lines of what we recommended for their counterparts in Sections 14, 15, and 16(2) - as illustrations only of what might be regarded as injurious.

Reducing the Scope of the Class-Test Exemptions

Despite the best of intentions and efforts, it is likely that certain categories of information will require a class-test exemption. The kind of matters involved could well preclude a case by case assessment of injury. But, in view of the predisposition to overbreadth, it would be useful to examine the surviving class-test exemptions so that, where possible, their scope might be reduced.

Consider the Section 22 exemption for "advice or recommendations developed by or for a government institution or Minister of the Crown". While elements of such an exemption are difficult to impugn on a class-test basis, the Section might nevertheless stretch beyond the bounds of necessity. Documents embodying such "advice or recommendations" frequently also contain factual data and expert interpretations of the data. While certain advice and recommendations might legitimately be withheld, no such case could be made insofar as the factual and interpretive material is concerned. To the extent that the latter material can be severed, the statute should require it.

But there are even certain kinds of "advice or recommendations" that should not be covered by this exemption. It is one thing, for example, to exempt the recommendations of a civil servant concerning policy choices. But it is another thing entirely to exempt the advice of a professional expert concerning what is likely to happen as a result of such choices. Nor should the recommendations of a public inquiry be immune from disclosure. Moreover, the words "advice and recommendations" should not apply so as to exempt an explanation or interpretation of a decision already made, the reasons or justifications for such a decision, or any guidelines for the interpretation of existing laws and regulations.

The class exemption for solicitor-client privilege may also extend too far. In law the privilege belongs to the client, not to the solicitor. The silence of the solicitor is required in order to protect the interests of the client. But this is not to oblige the client to protect his solicitor's communications. In the unique situation where government is the client, the determination of disclosure versus confidentiality should depend upon the timing and subject matter of the communication at issue. The mere fact that the document in question represents the advice of a solicitor should not, by itself, resolve the issue.

Indeed, there will be many occasions when the public should know what legal advice has been given to the government. The test with respect to any such communications is whether the public's tactical advantage in secrecy outweighs its general interest in scrutiny. If, for example, litigation has begun or is pending, legal advice relevant to it might well be withheld. On the other hand, in situations where litigation has been completed or is not even contemplated, there might be a more compelling case for disclosure.

In general, there will be little objection to the exemption in Section 20(2) for the "results of product or environmental testing" if the government performed such testing for a fee. Yet, even here, the exemption may be overbroad. Suppose, for example, the results of such a test revealed a substantial health hazard? It is questionable whether the mere payment of a fee should suffice to deny the public such information. We would recommend, therefore, an exemption to this exemption in situations where, in the opinion of the adjudicator, an overriding public interest would be served by disclosure. Moreover, the other exemption incorporated in Section 20(2) appears needlessly patronizing - the results of a test which the head of the institution believes to be misleading. This exemption should be dropped entirely.

Reducing the Number of "In Confidence" Exemptions

It is hard to quarrel with the inclusion of a class exemption for information which is received by the government from other parties in confidence. Unless the government could guarantee to treat the information in confidence, there would be little basis for the kind of trust which is so necessary in the government's dealings with other parties. What the skeptical critic cannot overlook, however, is the possibility that the government might too readily agree to receive, in confidence, information which should be made public.

In this connection, the Information Commissioner should be mandated to perform periodic audits of any such governmental arrangements. With a complete right of access to the relevant material, the Information Commissioner should be able to assess whether any of these agreements involve the unreasonable concealment of information which should be made public. To the extent that such a judgment is made, the Commissioner should be empowered to try and negotiate a voluntary release of the information at issue. In cases where these negotiations fail, the Information Commissioner should be empowered to report to Parliament the existence, if not the details, of such questionable agreements. The anticipation of political embarrassment from such reports could well serve as a deterrent against the unreasonable receipt of information "in confidence".

Reducing the Number of Other Statutory Exemptions

The Bill would mandatorily exempt those categories of information which other Acts of Parliament require to be withheld.

In order to reduce what might be needless exemptions mandated by such other statutes, this Bill requires the establishment of a Parliamentary Committee to review the other statutes and report back its findings within a particular period of time. In view of the experience with so many committee and royal commission reports, this procedure inspires little confidence that the requisite amendments will be made. Accordingly, we would suggest a change in the procedure. After a designated period of time, the provisions of all other statutes should lapse to the extent that they require or permit the withholding of information from public scrutiny. The only way to prevent the lapse would be for Parliament to re-enact the restriction. The adoption of such a procedure would force a Parliamentary analysis, case by case, of every such statutory provision. The onus would be where it should be - on those who wish to withhold information.

The Special Conflict Between Access and Privacy

With few exceptions, Section 19 requires the withholding of any record containing information about an identifiable individual. The Bill then sets out a list of categories which must be denied public access, but they are to apply "without restricting the generality of the foregoing".

As much as we support the protection of personal information from unwarranted disclosure, we regard this exemption as needlessly, even perilously, wide. There are innumerable situations where the whole point of public access could be thwarted unless the names of the concerned parties were available for public scrutiny. The public's ability to influence government performance will frequently require a knowledge of how government treats different people - rich, poor, friends, foes, etc.

Indeed, such public identification will often be necessary to ensure the requisite government action. The current Section 19 must be seen, therefore, as a potential impediment to much of the contemplated access exercise.

The Joint Parliamentary Committee on this subject proposed to resolve this problem by providing an exemption to freedom of information for what it called "unwarranted" invasions of personal privacy. This approach would involve a "balancing test" from case to case. Like the Parliamentary Committee, we are not prepared to assume that the protection of "personal information" should so invariably prevail over the interests of public disclosure. But, unlike the Parliamentary Committee, we are not prepared to endow the adjudicators with such a wide discretion to resolve such conflicts as their taste buds might dictate.

While such legislation cannot predetermine how these conflicts are to be resolved, it can set out a number of guidelines on the basis of which the adjudications should be rendered. The appendix to this brief contains a number of possible guidelines which this legislation might well incorporate. In the first place, we reproduce some suggestions we made a few years ago to the Williams Commission in Ontario. In the second place, we reproduce the guidelines recommended by the Williams Commission itself. In our view, the approach taken and the guidelines recommended in both documents represent a sound basis for the development of statutory criteria in this difficult problem area.

Reducing the Indirect Powers of Exemption

Unfortunately, the Bill's direct powers of exemption do not exhaust the government's ability to withhold information from public access. In these respects, the Bill creates a number of possibilities for the government to do indirectly what it might not be able to do directly.

Section 5(3) might be construed so as to permit the exclusion of material from a published index on the basis of the Minister's unilateral determination that the material at issue falls into an exempted category. To the extent that a

Minister did this, he would effectively withhold access to material and simultaneously by-pass the review machinery of the Act. A proper indexing system is obviously crucial to freedom of information. We would suggest, therefore, that the indexing system itself be made explicitly subject to the jurisdiction of the Information Commissioner. In the event of a dispute over an exclusion from an index, the Commissioner should be empowered to seek redress in the courts. In the event of a dispute over the adequacy of descriptions in an index, the Information Commissioner should have recourse to publicity and Parliament. In order to ensure the viability of this approach, the Ministers should be required to notify the Information Commissioner about any proposed exclusions from a published index.

At the moment, a governmental refusal of an access claim need not be accompanied by any indication as to whether the record at issue is even in existence. The prospect of complaining and litigating for what may be a non-existent record could well discourage the most meritorious of applications. Admittedly, there are some situations where the public interest might well be served by the non-acknowledgement of a record's existence. At most, however, that is an argument for a narrow exemption confined to such situations. Accordingly, governmental refusals to provide access should be encumbered by the obligation to indicate whether or not the record at issue is in existence unless such acknowledgement could reasonably be expected to cause one of the statute's apprehended injuries. But, even where such non-acknowledgement is exercised, the government should be obliged automatically to report its decision to the Information Commissioner. In that way, some independent review will occur even if the applicant has already been effectively discouraged.

It is conceivable that some access claims might be refused on the grounds that the requisite "control" over the information did not reside in the government institution which was approached. It would be helpful, therefore, if the Act spelled out more precisely the components of "control". At a minimum, in our view, it should include either actual physical possession or an effective right to acquire such possession. If either of those two elements are present in any government institution, it should be deemed to have sufficient "control" for purposes of responding to access claims.

Reducing the Costs

A perennial impediment to the quest for justice is financial cost. If freedom of information is going to work, the cost of access will have to be moderate. We are concerned that the fees and costs provisions of this Bill will not adequately serve the goal of moderation. It would be helpful, therefore, to consider some measures for the reduction of costs.

At the moment, the only access contemplated by the Bill involves the physical transmission of a copy of the record sought by the applicant. Strangely, the Bill does not confer upon the applicant any right to inspect the record at issue. In many cases, however, inspection might well prove satisfactory. To the extent that it did, of course, the transaction might be handled less expensively. At least in those cases where the costs accumulated more by copying than by searching, a right of inspection would help considerably to reduce the account.

Under the present terms, disputes over proposed access fees could be referred to the Information Commissioner. But, unlike disputes concerning actual rights of access, fees disputes cannot be referred to the courts. In such circumstances, therefore, governmental decisions will not be subject to reversal. Even or perhaps especially where disputes about fees are concerned, it is unnecessary and unfair for the government to be the umpire of its own ball game. In our view, the Bill should be amended so as to empower the Information Commissioner to reverse the government on the question of fees.

In the event that a question concerning a right of access is referred to the courts, there could be a further and substantial question of costs. One way to bring such court costs within the competence of low and middle income applicants is to expand their claims on the public purse. In our view, there should be an incontestable right to publicly subsidized court costs in those situations where the Information Commissioner substantially supports the position of the applicant. Surely that would constitute a reasonable amendment. The Information Commissioner would be an independent official created by the legislation. If such an official thought that there were so much merit in the applicant's position,

it would be in the public interest to have the matter litigated. And what is in the public interest has a valid claim on the public purse.

A Word About Enforcement and Administration

Section 33 requires that, before commencing an investigation, the Information Commissioner must notify the head of the government institution concerned and reveal the substance of whatever complaint is involved. It is interesting to note the relative absence of such encumbrances elsewhere in our law. Few government departments, for example, are required to notify citizens before investigating them. Why the special solicitude for government officials? There is no reason for double standards in these matters. Like the ordinary civilian, the head of a government institution should have an opportunity to make representations before suffering the effects of an adverse adjudication. And, like the ordinary civilian, such head should be initially susceptible to investigation without advance warning.

Section 68(d) permits various Ministers to prescribe "what information" is to be included in their departmental reports to Parliament regarding the experience with freedom of information. Such a wide range of ministerial discretion is hardly consistent with the objectives of this Bill. The statute, not the Minister, should determine the range of information to be reported to Parliament.

Section 74(2) empowers Cabinet to add to the schedule of agencies which will be governed by this legislation. Thus, if any new agencies were created, the Act would not apply to them unless and until Cabinet specifically added them to the schedule. Governmental inertia should not operate so as to preclude the right of public access. In our view, the procedure should be turned around. This legislation should apply to all government departments, agencies, Crown corporations, and public institutions effectively controlled by the government, now and hereafter, unless this or subsequent legislation explicitly exempts them. Again, this would put the onus where it should be - on those seeking an exemption from public access.

In addition to the purpose which inspired collection, the Bill would allow such other uses as are consented to by the person concerned, and whatever is "consistent with" the original purpose. Unfortunately, the Bill provides little guidance as to what is a proper "consent" and no definition of a "consistent" use.

In our view, these defects should be remedied. As far as consent is concerned, measures must be adopted to ensure that it is informed and voluntary. At a minimum, there should be a requirement that consents be written and specifically addressed to the contemplated purpose. Open-ended general consent should not suffice. Moreover, the law should provide that a refusal to consent will not produce adverse consequences with respect to the original purpose of the information collection. Indeed, the law should further require that the person concerned be specifically informed of this protection. In cases of acute dependency, the consent should require the availability of subsidized legal advice.

The concept of a "consistent" use might create a rather wide loophole. To what extent might it be argued, for example, that a use is consistent so long as it is not inconsistent? In order to avoid the prospects of overbroad interpretation, the statute should include a definition of "consistent". A vital component of this definition should involve the reasonable expectations under which the information was initially provided. In our view, any use which exceeds such reasonable expectations should require either a duly executed consent or an explicit statutory authorization.

The Bill delineates a number of additional disclosures which might be made of personal information. Among such permissible recipients are investigative bodies in circumstances where the disclosure would serve the purpose of enforcing a law of Canada or a province or the conduct of a lawful investigation. In our view, this provision is unjustifiably devoid of adequate safeguards. It is rare when the law permits investigative agencies to invade residential privacy without a judicial warrant. Why should the law permit such agencies to invade informational privacy without an analagous safeguard? The adoption of such a safeguard would help to ensure that proper grounds existed before such extraneous uses could be made of personal information. The "tunnel vision" so often associated with

THE PROTECTION OF PERSONAL INFORMATION

Collection, Retention, and Disposal

The power to collect personal information appears needlessly wide. The Bill simply specifies that such information must relate "directly to an operating program or activity" of a government institution. In our view, the Bill should be amended so as to require that such governmental collections of information must be necessary to governmental programs or activities.

Obviously, to whatever extent excessive data collection can initially be curtailed, subsequent improprieties may never arise. It would be wise, therefore, to address this problem more carefully than the Bill now does. On this basis, we recommend that a tighter necessity test replace the rather loose "relatedness" test. There is simply no reason to permit such collections of data unless they are necessary. In order to allow for some data collection in situations where the necessity is suspected but cannot be demonstrated, there should be a requirement of explicit statutory authorization. In that way, the exercise will require at least the safeguards of a Parliamentary debate.

For some reason, the enforcement sections of the Bill do not seem to provide for judicial review of governmental practices with respect to the collection, retention, and disposal of personal information. Indeed, the Privacy Commissioner does not have the same discretion to initiate an investigation of these matters as he does where exempt banks and the use of personal information are concerned. In the latter two areas, the Privacy Commissioner appears to have a power of ongoing audit. But, where collection, retention, and disposal are concerned, he may need "reasonable grounds" to launch an investigation on his own initiative.

In view of the importance of the initial collection to everything which happens subsequently, there is simply no basis for such a wide discrepancy in these powers to investigate and review. We recommend, therefore, a comparable increase in the Privacy Commissioner's power to initiate investigations, report to Parliament, and refer to court any matter concerning governmental collection, retention, and disposal of personal information. Concomitantly, of course, there should be a power in the Federal Court to order the requisite compliance with the statute.

In order to minimize intrusive data collection practices, there is a general requirement to collect the material directly from the person concerned and to advise him of the purpose for which the collection has been undertaken. Understandably, this requirement can be by-passed in situations where compliance with it might result in the collection of inaccuracies and the undermining of the use for which the information was collected. Since these exceptions are themselves subject to abuse, the Bill should encumber their exercise with an additional safeguard. At the very least, there should be a requirement that the Privacy Commissioner be notified whenever the person concerned is not notified. In that way, there can be an independent review of every governmental claim for exemptions from the foregoing obligations.

In addition to the above duty to advise the person concerned of the anticipated purpose for the information, the government should also be obliged to indicate by what legal authority it is proceeding, whether the cooperation of the person is mandatory or voluntary, the identity and location of a government official who can answer further questions, and what, if any, access and correction rights there are with respect to the information.

Unfortunately, the Bill fails to specify a clear obligation for the disposal of personal information. It would simply delegate such power to the Cabinet or the Minister. In our view, this issue is too important to be left for regulation; it should be a matter of clear statutory duty. Apart from those situations where the data subject himself could be prejudiced, the Act should require destruction of personal information which can no longer reasonably be considered necessary for the purposes which occasioned its initial collection or current permissible use.

Uses and Disclosures

Among the most important protections in the Bill are the restrictions it seeks to impose on the uses which may be made of personal information. To whatever extent information collected for one purpose is available for another purpose, substantial amounts of privacy could be lost.

In addition to the purpose which inspired collection, the Bill would allow such other uses as are consented to by the person concerned, and whatever is "consistent with" the original purpose. Unfortunately, the Bill provides little guidance as to what is a proper "consent" and no definition of a "consistent" use.

In our view, these defects should be remedied. As far as consent is concerned, measures must be adopted to ensure that it is informed and voluntary. At a minimum, there should be a requirement that consents be written and specifically addressed to the contemplated purpose. Open-ended general consent should not suffice. Moreover, the law should provide that a refusal to consent will not produce adverse consequences with respect to the original purpose of the information collection. Indeed, the law should further require that the person concerned be specifically informed of this protection. In cases of acute dependency, the consent should require the availability of subsidized legal advice.

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The Bill delineates a number of additional disclosures which might be made of personal information. Among such permissible recipients are investigative bodies in circumstances where the disclosure would serve the purpose of enforcing a law of Canada or a province or the conduct of a lawful investigation. In our view, this provision is unjustifiably devoid of adequate safeguards. It is rare when the law permits investigative agencies to invade residential privacy without a judicial warrant. Why should the law permit such agencies to invade informational privacy without an analagous safeguard? The adoption of such a safeguard would help to ensure that proper grounds existed before such extraneous uses could be made of personal information. The "tunnel vision" so often associated with

investigatory agencies should be made subject, where possible, to an independent evaluation. Apart from situations of imminent peril to life or limb, such disclosures should require a judicial warrant.

Section 8(2)(f) of the Bill would allow the disclosure of personal information "under an agreement or arrangement" between the Government of Canada and another governmental organization. This section creates a very wide risk of continuous and indefinite dissemination of the data in question. Indeed, to the extent that there is a disclosure to anyone beyond the control of Parliament, there is a possibility of further dissemination for purposes beyond the intentions of the Bill itself.

To the extent possible, the Bill should restrict further disclosures to purposes "consistent" with those law enforcement functions contemplated by the section. In any event, the government should be specifically required to publish the terms and provisions of any such agreement or arrangement. Such a requirement would help to reduce the number of questionable arrangements which the government would be willing to undertake. To whatever extent the terms of any such agreement could (or must) be withdrawn from public scrutiny, they should be subject nevertheless to a mandatory review by the Privacy Commissioner. He should be required to report to Parliament the existence, if not the details, of any such agreement which, in his opinion, unreasonably compromises the privacy of Canadian citizens and permanent residents. The Privacy Commissioner should also perform continuing audits of the actual transactions conducted under these agreements. It is not hard to anticipate how such scrutiny can help to minimize impropriety in this area.

Under Section 8(2)(1)(i), there can be a further disclosure "for any purpose where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure". This is an obviously risky provision. While there may be situations hitherto uncovered by the Bill where such disclosure would be preferable to concealment, the resulting statute ought to indicate what kind of circumstances would so qualify. Significantly, the rather comprehensive report of the Ontario Williams Commission recommends no such residual discretion. In the alternative, the

opinion of the government official should not be the ultimate test for a valid disclosure. At the very least, his decision should require reasonable grounds.

Where the uses and disclosures of information are concerned, the Privacy Commissioner has a wide discretion to initiate investigations and report his findings to Parliament. Unlike the situation with access to information and the wrongful inclusion of files in exempt banks, however, judicial review does not appear to be available. In our view, there is no valid reason for such differential remedies. The Bill should be amended, therefore, to empower the Privacy Commissioner to refer to the Federal Court any unresolved issues concerning the use or disclosure of personal information. And the Court, in turn, should acquire an explicit jurisdiction to remedy statutory breaches in this area.

Access and Corrections

The Bill provides an opportunity for records to be inspected and notations to be made by those to whom the material relates. Like the proposed freedom of information provisions, there are a number of exemptions to this right of access. Since the exemptions are so similar in both parts of the Bill, suffice it to incorporate by reference here the suggestions we made for amendments there.

There is one exemption worthy of comment which does not appear in the first part of the Bill. Section 29 of the Privacy Bill would permit an exemption for personal information relating to physical or mental health in circumstances where a duly qualified physician or psychologist compiled the information and certified that the requisite access "would be contrary to the best interests" of the person concerned. In our view, the contemplated injury here is not great enough to justify such a denial of access. At the very least, the anticipated harm should have to be serious. Moreover, it should not suffice for a health provider to make a unilateral determination. The right of people to see their own files should not be restricted unless there is some form of independent evaluation of the anticipated harm. In this regard, it should be noted that the

Krever Commission in Ontario made a recommendation similar to what we are advocating here.

Reducing the Costs

We incorporate by reference here, where applicable, our recommendations in the access part of the Bill.

A Word About Administration and Enforcement

Again, we incorporate by reference here, where applicable, what we recommended in connection with the administration and enforcement of the access part of the Bill. Moreover, we believe this Bill would be strengthened by the creation of offences and the addition of penalties for the violation of the privacy protection provisions.

APPENDIX NO. 1

Extracts from the CCLA brief to the Williams Commission in Ontario

Re: The Special Conflict Between Public Access and Personal Privacy

The Special Conflict Between Public Access and Personal Privacy

Invariably, cases will arise where the two concerns of this Commission will come into conflict. One citizen may seek access to a government document which contains information about another citizen. To whatever extent a document identifies a particular person, the interests of freedom of information and personal privacy could collide.

The Federal Green Paper on freedom of information would resolve this conflict by deferring always to the privacy interest. It recommends an exemption for "those documents which might disclose personal information as defined in ... the Canadian Human Rights Act." It's one thing, however, to restrict the public disclosure of names on the basis that to do so might represent a use of the information beyond the purposes for which it was collected. Moreover, it would be appropriate to withhold names in circumstances where the information was provided in the reasonable expectation of confidentiality. As indicated earlier, the release of information in such categories should require either the consent of the persons affected or explicit statutory authorization. But not all "personal information" falls into these categories. As defined in the Canadian Human Rights Act, this term is wide enough to cover virtually any material about an individual which could identify him.

On the basis of the Green Paper's recommendation, for example, a health inspector's report on a diseased restaurant would not be subject to compulsory release if to do so would identify the name of the proprietor. Yet it could not be said that the information was provided to the inspector in the reasonable expectation of confidentiality. Nor could it be claimed that the public release of such material exceeds the purpose for which it was acquired. Indeed, in the circumstances it might well be argued that full public disclosure represents the very fulfillment of the inspection exercise.

This does not mean that, apart from considerations of confidentiality and alternate use, it would always be appropriate to release the names of persons concerning whom the government has information. In many cases, the document at issue might contain

unfounded or ill-founded statements about certain named persons. The report of a consultant or inspector, for example, might represent only the first stage of a government plan or statutory proceeding. Perhaps a subsequent inspection or a person's reply would effectively vitiate the initial report? To force the release of all such documents, irrespective of their possible prematurity, is to incur a considerable risk of unfair damage to the reputations of those who are identified. On the other hand, there will be times when the disclosure of such material will be necessary to ensure the requisite follow-up government action. In such situations, the whole point of public access would be thwarted unless the parties were named. The public's ability to scrutinize government performance will frequently require a knowledge of how it treats different people - rich, poor, friends, foes, etc.

The Joint Parliamentary Committee which considered the Green Paper would resolve this problem by providing an exemption to freedom of information for what it calls "unwarranted" invasions of personal privacy. By contrast to the Green Paper, this approach would involve a "balancing test" from case to case. Like the Parliamentary Committee, we are not prepared to assume that the protection of "personal information" should always prevail over the interests of public disclosure. But, unlike the Parliamentary Committee, we are not prepared to endow the adjudicators with such a wide discretion to resolve these conflicts as their taste buds might dictate.

While the proposed legislation cannot predetermine how these conflicts are to be resolved, it can set out a number of guidelines on the basis of which the adjudications should be rendered. What follows are a few suggestions for the kind of guidelines which might be incorporated into the resulting statute. They should be read subject to the above exceptions concerning confidentiality and alternate use. Moreover, even where identifying elements are properly withheld, there ought to be the fullest possible disclosure of the information itself.

In resolving a conflict between access and privacy, one of the first matters to consider is the particular statute under which the information at issue was acquired. Suppose, for example, what is involved is the identity of a person who is the object of a complaint under the Ontario Human Rights Code? The policy of the Code is, where

possible,to conciliate complaints of discrimination. The prospect of adverse publicity is one of the levers by which the Ontario Human Rights Commission elicits a conciliatory response from those whose conduct has been impugned. This goal could be frustrated by the public identification of a respondent before that process had been completed or after the respondent had made amends for his earlier misconduct. Adverse publicity under such circumstances could remove one of the incentives for cooperation with the conciliation process. Guideline No. 1 - The decision to disclose or withhold identifying material should depend upon which alternative would better fulfill the policy of the statute under which the information was acquired.

There is another reason why compulsory disclosure is of less urgent concern in the case of the average human rights complaint than it might be in other situations. In most of these cases, there is likely to be another party with an interest in the proceedings - a complainant who has been victimized by discrimination. Since his interests are adverse to those of the respondent and he is able at any time to publicize the suspected misconduct, it appears that the freedom of information goals could readily be served without the intervention of compulsory disclosure. These considerations lead to Guideline No 2 - The susceptibility to disclosure of identifying material should be reduced in those situations where the freedom of information goals are readily amenable to fulfillment in some other way.

Of course, there is more chance that compulsory disclosure would be necessary in the situation where there were only two parties to a dispute - the government and the respondent. Under such circumstances, public knowledge might be a vital ingredient to ensure government performance. Even at that, however, compulsory disclosure should not be automatic. Other factors must also be considered. One such matter concerns the presence or absence of de facto safeguards. In view of the possibility that a report by a single inspector could have a devastating impact on a person's business, it would be appropriate to consider how far, if at all, such person had any kind of opportunity, however informal, to make a case on his own behalf. Was the inspection carried on in his presence or absence? Was he consulted about what was likely to be reported and given an effective chance to explain and rebut potential allegations against him? In this connection, it will be appreciated that a sufficiently

injurious report could effectively nullify the value of any subsequent right to a hearing. Guideline No 3 - The susceptibility to disclosure of identifying material should increase in accordance with the number and effectiveness of the de facto safeguards which might have operated in favour of the person affected.

But not all of the documents in the government's custody are equally reliable. The report of a licence inspector, for example, would be much more trustworthy than the submission of a discredited consultant who may have been involved in conflict with the affected person. Such considerations give rise to Guideline No. 4 - The susceptibility to disclosure of identifying material should be reduced on the basis of reasonable misgivings concerning its reliability.

Another important issue is how disclosure might affect the ultimate prospects for a fair hearing. Since so many of the inspections and reports, at some stage, could become evidence at a licence hearing, civil lawsuit, or criminal prosecution, any decision to release such material will have to consider the effect on such proceedings. Premature disclosure could bias the fact-finders. Such risks would obviously be greater in the event of a criminal prosecution before a jury than with a licencing issue before an expert tribunal. It would be wise, therefore, for the decision regarding disclosure to consider what kind of proceedings, if any, are likely to ensue as a consequence of the material at issue and how the material might influence the fairness of such proceedings. Guideline No. 5 - The susceptibility to disclosure of identifying material should be reduced to the extent that it is seen as a likely impediment to a fair hearing.

Of course, the converse could also be true. Sometimes the failure to reveal names could undermine the fairness of a hearing. Parties seeking adjudication require the fullest possible disclosure of all relevant evidence. Guideline No. 6 - The susceptibility to disclosure of identifying material should be increased to the extent that it is necessary to a fair hearing.

Sometimes, however, the very problem involved is that neither a hearing nor any other kind of action appears likely. There are numbers of situations where government departments simply fail to take the corrective measures which are required. Whether the motivating influence is corruption, favouritism, or just plain inertia, disclosure would be called for. Indeed, it might be the one element which could produce action where otherwise there was none. For such purposes, different considerations might well apply to a report completed last week from one which was completed last year. In the more recent case, there would have been much less opportunity to disprove or correct whatever deficiencies might have been alleged. In such a situation, the balance might weigh more heavily on the side of personal reputation than public disclosure. On the other hand, the older the report, the more opportunity the government and the parties will have had to deal with whatever problems may have emerged. As time goes on and less is done, the equities begin to shift. Guideline No. 7 - The susceptibility to disclosure of identifying material should increase with the age of a document and the lack of action with respect to it.

In some cases, none of the foregoing cautions might be sufficient to rescue a document with its named parties from public disclosure. Suppose, for example, an inspector's report asserted that a certain brand of meat contained highly toxic chemicals? In such a situation, the health interests of the consuming public might well outweigh the commercial reputation and due process claims of the meat processor. Guideline No. 8 - The susceptibility to disclosure of identifying material should increase on the basis of the imminence and seriousness of potential hazards to the lives, limbs, and health of members of the public.

Here again, the converse could also be true. Sometimes, the disclosure of a person's identity could also endanger him. Certainly many police informers would fall into this category. Guideline No. 9 - The susceptibility to disclosure of identifying material should be reduced to the extent of the anticipated dangers to the lives, limbs, and health of those identified.

In any event, the law should attempt to be as fair as possible to those whose reputations are likely to be injured by the release of any material. Guideline No. 10 - Where practicable having regard to the interests which these guidelines are designed to protect, affected persons should be given an opportunity in camera to make representations against the release of government material which would identify them.

APPENDIX NO. 2

Extracts from the Report of the Williams Commission in Ontario

Re: The Special Conflict Between Public Access and Personal Privacy

Personal Privacy

48. An exemption to the general principle of access should be made to protect personal privacy. The exemption should contain these features:
    a. a list of situations in which there is an overriding interest in disclosure;
    b. a balancing test permitting disclosure not amounting to an "unwarranted invasion of privacy" and indicating a range of factors to be taken into account in applying this test;
    c. a definition of sensitive personal information which is to be subject to a presumption of confidentiality.

49. With respect to item 48(a), the following is proposed:
    No individually identifiable record shall be disclosed by any means of communication to any person other than the individual to whom the record pertains unless the disclosure is:
    a. pursuant to a written request by, or with the prior written consent of, the individual to whom the record refers (provided that the record is one which the individual himself is entitled to see);
    b. pursuant to a showing of compelling circumstances affecting the health or safety of any individual, if upon disclosure notification thereof is transmitted to the last known address of the individual to whom the record pertains;
    c. of information collected and maintained specifically for the purpose of creating a record available to the general public;
    d. pursuant to a statute of Ontario or Canada that expressly authorizes the disclosure;
    e. for a research purpose if
        i. the use of disclosure is consistent with the conditions or reasonable expectations of use and disclosure under which the information in the record was provided, collected and obtained;
        ii. the research purpose for which the disclosure is to be made:
            A. cannot be reasonably accomplished unless the information is provided in individually identifiable form; and
            B. warrants the risk to the individual which additional exposure of the information might bring;

iii. the qualifications of those who will conduct the research warrant the conclusion that the research objectives will be satisfactorily achieved;

iv. the research proposal is soundly designed in terms of its ability to achieve the stated research objectives, its cost-effectiveness, and its reduction, to the extent practicable, of the inconvenience of those public servants or agencies who are the custodians of the data in question; and

v. terms and conditions relating to:

A. the security and confidentiality of the data;

B. the destruction of the individual identifier or identifiers associated with the record at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the research or statistical project;

C. the prohibition of any subsequent use or disclosure of the record in individually identifiable form without the express authorization of the department or agency from which the data is obtained,

have been approved by the Ontario Data Protection Authority and the recipient has filed with the DPA a written statement attesting to his understanding of, and willingness to abide by, such terms and conditions;

f. determined not to constitute an unwarranted invasion of personal privacy.

50. With respect to item 48(b) the following is proposed:

In determining whether a particular invasion of privacy is, in the circumstances, warranted, the following factors, among others, may be considered:

a. whether the information is necessary for the purpose of subjecting the activities of the province and its agencies to public scrutiny;

b. whether access to the information sought may promote public health and safety;

c. whether access to the information sought will promote informed choice in the purchase of goods and services;

d. whether the requested information is relevant to a fair determination of rights affecting the requester;

e. whether the record subject will be exposed unfairly to substantial harm, pecuniary or otherwise;

f. whether the information is of a highly sensitive personal nature;
g. whether the information is unlikely to be accurate or reliable;
h. whether the information has been supplied by the data subject in confidence.

51. With respect to item 48(c), the following is proposed:

In the absence of a substantial interest in public access, disclosure will be presumed to constitute a clearly unwarranted invasion of personal privacy in personal records:

a. relating to medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation, other than information confirming an individual's presence in a health care facility;
b. compiled and identifiable as part of an investigation into a possible violation of criminal law except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
c. relating to eligibility for social service or welfare benefits or to the determination of benefit levels;
d. relating to employment history, other than an individual's acts as a government employee or officer and the fact of government employment, including the position held and the level of compensation;
e. obtained on an income or similar tax return or gathered by an agency for the purpose of administering an income or similar tax;
f. describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
g. which are personal recommendations or evaluations, character references or personnel evaluations;
h. indicating racial or ethnic origin or religious or political beliefs and associations; or
i. required to be kept confidential by law.

SUMMARY OF RECOMMENDATIONS

On the Accessibility of Government Information

1. Wherever a harms-test is used, require that the anticipated harm be at least "significant".

2. In order to reduce the number of class-test exemptions, adopt the following measures:
   (a) require a harms-test in the law enforcement exemptions of Section 16(1)
   (b) require that the classes enumerated in Sections 14 (federal-provincial relations), 15(defence, international affairs), 16(2)(aids to crime), and 18(c)(economic injuries) be treated simply as supportive, not conclusive, of governmental claims for exemption
   (c) delete Section 18(a) which would exempt information simply because it has "substantial value".

3. In order to reduce the scope of the class-test exemptions, adopt the following measures:
   (a) ensure that the Section 22 exemption for "advice or recommendations" does not include the following:
      (i) factual data and expert interpretations of such data
      (ii) the advice of professional experts concerning the likely consequences of policy choices
      (iii) the recommendations of a public inquiry
      (iv) explanations or interpretations of past decisions
      (v) the reasons or justifications for such decisions
      (vi) guidelines for the interpretation of existing laws and regulations
   (b) ensure that the Section 24 exemption for "solicitor-client privilege" applies only when the tactical interest in secrecy outweighs the general interest in scrutiny
   (c) ensure that the Section 20(2) exemption for compensated product testing does not include a situation where there is an overriding public interest in disclosure and delete completely the exemption for the results of such tests which are believed to be misleading.

4. In order to reduce the number of "in confidence" exemptions, mandate the Information Commissioner to adopt the following measures:
   (a) perform periodic audits of governmental arrangements to receive information in confidence
   (b) assess whether such arrangements involve the unreasonable concealment of information which the public should have
   (c) to the extent that such is the case, attempt to negotiate a voluntary release of such information
   (d) where such negotiations fail, report to Parliament the existence, if not the details, of such unreasonable agreements to receive information "in confidence".

5. In order to reduce the number of other statutory exemptions, provide that, within a designated period of time, they will lapse unless explictly re-enacted by Parliament.

6. As regards the special conflict between access and privacy, replace the approach used in Bill C-43 by the one used in the report of the Williams Commission in Ontario and the CCLA's submission to that Commission.

7. In order to reduce the indirect powers of exemption, adopt the following measures:
   (a) subject the indexing system to the jurisdiction of the Information Commissioner so that the following measures will be adopted:
      (i) Ministers will be required to notify the Commissioner of any proposed exclusions from a published index
      (ii) the Commissioner will be empowered to publicize in Parliament any dispute over the adequacy of a description in an index
      (iii) the Commissioner will be empowered to litigate any dispute over an exclusion from an index
   (b) require that governmental refusals to provide access be accompanied by an indication as to whether or not the record at issue is in existence unless such acknowledgement could reasonably be expected to cause one of the statute's apprehended injuries. And, where such non-acknowledgement is exercised, require the government to report its decision to the Information Commissioner
   (c) provide that, if a government institution has actual physical possession or an effective right to acquire such possession of a document, there is sufficient "control" for the purpose of responding to access claims.

8. In order to reduce costs, adopt the following measures:
   (a) provide an additional right to inspect records
   (b) empower the Information Commissioner to reverse the government on the question of fees
   (c) provide public subsidies for the court costs of those applicants whose claims are substantially supported by the Information Commissioner.

9. In order to improve enforcement and administration, adopt the following measures:
   (a) delete the requirement that, before launching an investigation, the Information Commissioner must notify the head of the government institution concerned
   (b) require that the statute, not the Minister, should determine the range of information to be reported to Parliament
   (c) require that this Act would apply to all government departments, agencies, Crown Corporations, and public institutions effectively controlled by government, now and hereafter, unless this or another Act explicitly exempts them
   (d) require that any governmental failure to have records ready for inclusion under this Act be subject to the investigative jurisdiction of the Information Commissioner
   (e) in order to ensure a more adequate state of public knowledge with respect to rights and duties, adopt the following measures:
      (i) provide for the general availability, without recourse to this Act, of government manuals containing interpretations of applicable laws and regulations

(ii) require the Information Commissioner to conduct periodic audits of such availability and, in the event of governmental resistance, empower the Commissioner to seek a corrective order from the courts

(iii) provide that, in the absence of a proper exemption, no person should be subject to an adverse decision by the operation of such internal rules unless the accessibility requirements were fulfilled or the person in question had actual notice of the relevant rules

(f) empower the Information Commissioner to comment upon the access implications of existing statutes and pending Bills.

On the Protection of Personal Information

1. In order to improve the provisions on collection, retention, and disposal, adopt the following measures:
   (a) require that governmental collections of personal information must either be demonstrably necessary to governmental activities or explicitly authorized by statute
   (b) when personal information is not collected directly from the person concerned, require that the Privacy Commissioner be notified
   (c) when such information is collected directly, advise the person concerned of the anticipated purpose for the information, the legal authority for collecting it, whether the cooperation of the person is mandatory or voluntary, the identity and location of the government official who will answer further questions, and what, if any, access and correction rights there are with respect to it
   (d) apart from situations where the person concerned might be prejudiced, require that the government destroy personal information which can no longer be reasonably considered necessary for the purposes which occasioned its initial collection or its current permissible use
   (e) empower the Privacy Commissioner to launch investigations on his own initiative, report to Parliament, and refer to court any matter concerning collection, retention, and disposal.

2. In order to improve the provisions on uses and disclosures, adopt the following measures:
   (a) require that any consent to use information beyond the purpose for which it was collected must be accompanied by the following safeguards:
      (i) it must be written and specifically addressed to the contemplated purpose
      (ii) a refusal to consent must not produce adverse consequences with respect to the original purpose of the collection
      (iii) the person should be specifically informed of this protection
      (iv) in cases of acute dependency, there should be subsidized legal advice
   (b) require that, unless there is a consent or an explicit statutory authorization, any use or disclosure of the information should fall within the reasonable expectations under which it was initially collected
   (c) provide that, apart from situations of imminent peril to life or limb, disclosures to investigative agencies should require a judicial warrant
   (d) in order to improve the provisions for the disclosure of personal information "under an agreement or arrangement" between the Government of Canada and another governmental organization, adopt the following measures:
      (i) to the extent possible, restrict further disclosures to purposes consistent with the law enforcement purposes contemplated here
      (ii) in any event, provide generally that the terms and provisions of such arrangements be published
      (iii) to whatever extent this cannot be done, require that the matter be investigated by the Privacy Commissioner who will report to Parliament the existence, if not the details, of any such arrangement which, in his opinion, unreasonably compromises informational privacy
   (e) delete the residual discretion to disclose when, in the opinion of the requisite government official, the public interest in disclosure clearly outweighs any possible loss of privacy; alternatively, require at least that such official have reasonable grounds for such opinion.

(f) expand the jurisdiction of the courts to remedy statutory breaches concerning uses and disclosures

3. In order to improve the provisions on access and corrections, adopt the following measures:
   (a) incorporate here, where applicable, our exemption recommendations in the access part of the Bill
   (b) provide that the exemption for health interests contain the following amendments:
      (i) the contemplated injury must be serious
      (ii) there must be recourse to independent adjudication

4. In order to reduce the costs, incorporate by reference here, where applicable, our recommendations in the access part of the Bill.

5. In order to improve administration and enforcement, adopt the following measures:
   (a) incorporate here, where applicable, our recommendations in the access part of the Bill
   (b) create offences and provide penalties for violating the protections on personal information.