THE ACCESS TO INFORMATION ACT: A PRACTICAL REVIEW

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Introduction

The Access to Information Act has now been a permanent feature of Canadian society for more than three years. Despite the academic and political pressures brought to bear to expedite passage of this freedom of information legislation, the number of requests for information through the auspices of the Act have been surprisingly few. As well, the number of judicial review applications to the Federal Court of Canada pursuant to the Act have also been few in number. In spite of the lack of judicial pronouncements, this article will comment on those aspects of the Access to Information Act which have become a focus for judicial review and at the same time highlighting some of the procedural and practical aspects of the regime.

All of this is intended to spark interest in this developing area of the law. The writer's hope is to induce members of the bar to consider this avenue of investigation during the course of litigation before administrative tribunals and the courts.

Initiating a Request

The Access to Information Act grants the right to every person who is a Canadian citizen or a permanent resident to apply for and, subject to the Act, be given access to any record under the control of a government institution. Corporations would appear to have no such right and must act through agents who are Canadian citizens or permanent residents in order to obtain access to information. Other than the prerequisites of citizenship or permanent residency, there is no screening procedure for requests for information. Accordingly, information can be obtained for any purpose and by anyone acting through an appropriate agent.

The Act makes no specific mention of the form of request to be supplied to the government institution other than that it be made in writing and provide sufficient detail "to enable an experienced employee of the institution with a reasonable effort to identify the record." The Government of Canada has made available, through public agencies such as post offices, "Access to Information Request Forms." The Access to Information Act Regulations provide that a request under the Act must be made by completing an Access to Information Request Form or, alternatively, by a written request that provides sufficient detail to enable identification of a record by the appropriate officer.

Pursuant to the requirement in s. 5 of the Act, and in order to facilitate one's ability to provide sufficient detail in a request for information, the Treasury Board has published an Access Register. The Access Register is an index of departments of the federal government indicating the nature of matters governed by each department and the specific agencies under each department's control. The Register also describes the types of government records under the control of each department and its agencies. The Access Register is a revealing document which makes easier the difficult task of determining under whose administrative control any one governmental function lies. Thus its use will lie beyond formulating requests for information. The Access Register has been criticized for its vague and broad descriptions of the contents of records under the control of government institutions. Because of these broad descriptions, requests for information have at times yielded volumes of records and high fee estimates. As a result, its usefulness as a tool for initiating requests under the Act is in some doubt and will have to undergo review and revision.

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1 S.C. 1980-81-82-83, c. 111, Schedule I, ss. 54 to 58 proclaimed in force January 14, 1983; ss. 1 to 53, 59 to 77 and sch. 1 and II proclaimed in force July 1, 1983, as amended.
2 Toronto, Globe and Mail, April 27, 1982.
5 Access to Information Act, s. 4(1).
Each request for information must be accompanied by an application fee of $5.10 A further fee of $0.25 per photocopy is required to be paid upon the information being furnished to the party requesting. Other reproduction fees are chargeable depending on the form of reproduction requested.11 The Access to Information Request Form asks that the requesting party indicate what fees he authorizes to be charged. No search of a record will be completed until that authorization is given. Fees may be charged for copies made of a record12 or for every hour in excess of five hours “reasonably required” to search for or prepare a record for disclosure13 or for a record produced from a machine readable record.14 Where fees are charged other than for copies, the head of the government institution15 may require payment of a deposit before search or production is made.16

Once the written request and required fee is received by a government institution, where appropriate, the applicant will be notified of the estimate of total costs; the amount of deposit required to be paid, if any; he will be informed that he may personally examine records free of charge; that he may specify parts of the record to be produced17 and that he may complain about unreasonable fees to the Information Commissioner.18

The Act makes provision for the waiver of fees or any other amounts required to be paid.19 The Treasury Board Interim Policy Guide published for the use by civil servants in applying the Act and available to the public, suggests that waiver, reduction or refund of a fee by the head of a government institution should be decided by assessing whether the information sought is normally available without charge and “the degree to which a general public benefit is obtained through release of the information”.19a This test effectively allows the head of a government institution complete discretion in determining whether fees should be waived. The Treasury Board has reported that, of the requests for information received by government institutions, fees have been waived for approximately 30% of requests.20 This high percentage may simply be a reflection of the policy to waive fees in instances where the fee is too small to warrant initiating collection procedures.

One Ken Rubin made requests for information from several government institutions without submitting a $5 filing fee with each request.21 As a result, his requests were not considered applications within the terms of the Act by those government institutions. Mr. Rubin petitioned three Ministers to the Federal Court of Canada, Trial Division respecting their failure to consider his application, claiming that the filing fee requirement was not enforced uniformly by all departments.22 As the Act expressly authorizes the filing fee, Jerome A.C.J. refused Mr. Rubin’s application.

Exempted Information

The Act specifically exempts from disclosure records containing many types of information held by government institutions. Sections 13 to 27 of the Act provide broad descriptions of those records exempt from disclosure. The Act distinguishes between information of which a head of a government institution is required to refuse disclosure and information of which he has a discretion to refuse disclosure. Among the records of the former class are records containing information obtained in confidence from other governments or international organizations,23 personal information as defined in the Privacy Act24 and records which contain trade secrets and other confidential commercial

10 Access to Information Act, s. 11; SOR/83-507, s. 7(1)(a).
11 See SOR/83-507, s. 7(1)(b).
12 Access to Information Act, s. 11(1)(b).
13 Ibid., s. 11(2).
14 Ibid., s. 11(3).
15 Ibid., s. 3 defines “head”, in respect of a government institution to mean, in the case of a department or ministry, the minister or, in any other case, a person designated by Order in Council.
16 Ibid., s. 11(4).
17 SOR/83-507, s. 5.
18 Treasury Board, Interim Policy Guide, Part II, p. 15. In certain circumstances, the head of the government institution may specify that the applicant may only examine the record personally or that only a copy of the record will be provided to the applicant. See SOR/83-507, s. 8, as amended by SOR/85-395, s. 2.
19 Access to Information Act, s. 11(6).
23 Access to Information Act, s. 13(1).
24 Ibid., s. 19(1).
information. Any record containing information obtained or prepared by the R.C.M.P., in certain circumstances, must also be protected from disclosure.

Among the class of records also prohibited from disclosure are records restricted by a series of statutes listed in Sch. II of the Act. It is likely that any record previously restricted from public access by statute remains restricted by virtue of Sch. II of the Act. It is cumbersome to expect an applicant to consult these statutes prior to initiating a request and, therefore, it would be prudent to make application and, as with all other exemptions, patiently await the government’s decision regarding whether the record is exempted under the Act.

Among the records of which the head of a government institution has a discretion to refuse disclosure are records containing information which could reasonably be expected to be injurious to the conduct of federal/provincial affairs by the Government of Canada or any allied or associated state or to the “detection, prevention or suppression of subversive or hostile activities.” Information obtained or prepared in the course of criminal investigation or the enforcement of any law, federal or provincial, if less than 20 years old, or relating to law enforcement or criminal methods or techniques may also be protected from disclosure by the head of a government institution. As well, information which could reasonably be expected to threaten the safety of an individual or would likely injure the financial or other economic interests of the Government of Canada may also be protected from disclosure.

The Act expressly provides that it does not apply to confidential Cabinet material and proceeds to list examples of types of Cabinet information excluded from the operation of the Act. A similar provision is contained in the Privacy Act. The exception does not apply to confidential Cabinet material in existence for more than 20 years, and discussion papers, where decisions in respect of those discussion papers have been made public or four years have passed since decisions in respect of those discussion papers were made.

Of particular concern to practitioners will be the mandatory third party exemptions contained in the Act, exempting trade secrets and other confidential commercial information.

The third party exemptions are designed to protect disclosure of confidential information submitted by corporations or individuals in the course of many governmental inquiries. The exemptions are designed to facilitate the submission of information which, if otherwise disclosed, would likely injure a third party submitter’s economic interests. Although the exemption is mandatory, the information is subject to disclosure if the third party supplier of the information consents or if disclosure would be in the public interest as it relates to public health, safety or protection of the environment and the public interest clearly outweighs in importance the impact to the third party if disclosure is made. The exemptions contained in s. 20(1)(b) of the Act pertaining to records containing financial, commercial, scientific or technical information, that are confidential and treated consistently in a confidential manner by a third party and those contained in s. 20(1)(d) of the Act pertaining to information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party, were sought to be relied upon by the third-party applicant in Re Maislin Industries Ltd. and Minister for Industry, Trade and Commerce, Regional Economic Expansion in order to prevent disclosure by the Minister.

Jerome A.C.J. dismissed Maislin’s application for review of the
Minister's decision to disclose a portion of the government record regarding the granting of $34 million in loan guarantees by the Government of Canada in favour of Maislin Industries Ltd. The court was of the view that the information in issue was not confidential in its nature and had not been treated in a confidential manner by Maislin Industries Ltd. Some of the information was admittedly available in Maislin Industries Ltd.'s annual financial reports. As for the balance of the information, Jerome A.C.J. held that the application failed to persuade him, by any of the objective standards to which he had referred, that the information was confidential in its nature.

The test adopted by Jerome A.C.J. to determine whether information is confidential in its nature does not leap out at the reader even upon a careful reading of his reasons for judgment. The only test referred to by him is that contained in National Parks & Conservation Assn v. Morton, a case cited by counsel for the respondents. In National Parks, Tamm J. interpreted exemption No. 4 of the Freedom of Information Act as follows:

"To summarize, a commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."

The exemption contained in s. 20(1)(c) of the Act, not the subject of commentary in Maislin, exempts from disclosure information which, if disclosed, could reasonably be expected to result in material financial loss or gain to, or to prejudice the "competitive position" of, a third party. Other than the fact that s. 20(1)(c) does not require that to qualify for the exemption the information be confidential, the second branch of this test falls directly within the scope of s. 20(1)(c) of the Act. With all due respect, the second branch of this test is therefore of no aid in interpreting the confidentiality provision contained in s. 20(1)(b) of the Act.

The first branch of the test has been the subject of strong criticism in the United States. Standing alone, this branch of the test has no application to types of information which have been voluntarily submitted to government or for which a government institution has the power to compel submission. Accordingly, this test is wholly inadequate as a means of testing the confidentiality of information under the Access to Information Act.

A wholly subjective test, dependent upon the intentions of the submitter and receiver of the information, would be inadequate as a means of determining confidentiality. An appropriate test might be that advocated by James T. O'Reilly regarding exemption No. 4 of the Freedom of Information Act. He adopts as a definition of confidential information that type of information expressly excluded by the Restatement of Torts' definition of trade secrets: "information as to single or ephemeral events in the conduct of the business, as, for example, the amount of terms of a secret bid of a contract ... " To this may be added compilations of information such as computer programs regarding a business, processes and programs regarding suppliers or customers of a business and lists of employees. As well, in order to determine the confidentiality of the information it "must be judged in the light of the usage and practices of the particular industry or trade concerned."

It would appear that the mandatory third party exemptions are vague and in need of legislative clarification. The exemptions are multitudinous and may even be inclusive of each other. For instance, it is likely only in rare circumstances that confidential commercial information sought to be disclosed does not satisfy the

37 Ibid., at p. 424 D.L.R., p. 947 F.C.
38 498 F.2d 765 (1974).
39 See reference in Maislin, supra, footnote 36, at p. 421 D.L.R., p. 944 F.C.
40 5 U.S.C. para. 552. "Trade secrets and commercial or financial information obtained from a person and privileged or confidential."
42 However, see the commentary of K.C. Davis in, "The Information Act: A preliminary Analysis" 34 U. Chi. L. Rev. 761 (1967), who advocates the exemption of information submitted to government on the good faith understanding that it will remain confidential.

test contained in s. 20(1)(c) of the Act, preventing disclosure of information which could reasonably be expected to result in material financial loss or gain to, or prejudice the competitive position of, a third party. It would be reasonable to expect that confidential commercial information if disclosed will, at the very least, always prejudice the competitive position of the owner of that information.

Jerome A.C.J. referred to a further qualification for confidential information protected from disclosure pursuant to s. 20(1)(b). The information must have been kept confidential by both parties, the third party submitter and the government institution that received the information. The statute makes no mention of this requirement.

If confidential information is available from other sources to which the public has access than it would be expected that a government institution would not protect that information from disclosure. But government institutions should not be granted the discretion to determine confidentiality by disclosing information through other channels. Needless to say, the courts should not sanction unauthorized disclosure of confidential information by government agencies.

In instances where a government institution has disclosed confidential information through other channels, the court should weigh the effect of further disclosure before allowing disclosure pursuant to the Act. The court should distinguish between those instances where information, while available in the public domain through government, is not so well-known that further protection will benefit the third party submitter and those instances where information is, in a sense, too public to qualify as confidential.

Instances of government disclosure through newspaper accounts, press releases and ministerial budgets may disclose confidential information but justify protection from further disclosure pursuant to the Act. If the disclosed portion is sufficiently severable from the undisclosed, the latter should be protected from disclosure if otherwise exempt.

There will be circumstances, such as those existing in DMR & Associates v. Minister of Supply & Services, where future disclosure of information by government through information sessions to bidding competitors would justify disclosure of commercial information through the Act. Jerome A.C.J. found it inappropriate to restrain disclosure where it seemed “not only possible but quite likely” that the applicant’s competitors would have access to the allegedly confidential information.

**The Decision and Process for Review**

The Act confers upon the heads of government institutions the role of administering requests for disclosure. Within 30 days after a request for disclosure is made or, if circumstances require a greater amount of time, the head of the government institution must give written notice of his decision. If access to a record is not granted he must state in his written notice that the record does not exist or the specific provision of the Act upon which the refusal is based.

The head of a government institution is not required to indicate whether a requested record exists and, where he fails to do so in the written notice, he must indicate in the notice “the provision on which a refusal could reasonably be expected to be based if the record existed”. Jurisprudence to date suggests that the head of the government institution will be bound by the grounds of refusal asserted in his notice of refusal.

Where a statutory exemption applies, the head of the institution is required to disclose any part of a record that does not contain and can be reasonably severed from the exempted information.

In instances where third party information is intended to be disclosed, the head of an institution must notify the third party of this intention within 30 days after the request for access is received. Within 20 days after the notice is given, the third party...

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is given an opportunity to make written representations, or oral representations if so granted by the head of an institution, regarding disclosure.\textsuperscript{56} Within 30 days after notice, and if the third party has been granted the opportunity to make representations, he must make a decision regarding disclosure and notify the parties in writing of his decision.\textsuperscript{57} Interestingly, an applicant is not entitled to receive a copy of the notice provided to the third party, nor is an applicant entitled to reply to the representations made by a third party to the head of an institution.

The Office of Information Commissioner is established under the Act to receive and investigate complaints regarding refusals, fees, time-limits within which a decision regarding disclosure is to be made and the official language of the record disclosed.\textsuperscript{58} The Information Commissioner has herself described her mandate as that of an ombudsman.\textsuperscript{59} Complaints may be submitted by authorized individuals on behalf of a complainant.\textsuperscript{60} The complaint must be made in writing and made no later than one year from the time a request for a record was received by the head of the government institution.\textsuperscript{61}

The Information Commissioner is granted broad powers of investigation regarding complaints.\textsuperscript{62} The incumbent is Inger Hansen. She is obliged to give a reasonable opportunity to complainants, third parties and the head of government institutions to make representations during the course of the investigation but no party has the right to be present during an investigation or to have access to or comment on representations made to the Commissioner by any other person.\textsuperscript{63}

Any findings and recommendations made by the Information Commissioner are reported to all parties concerned. Those recommendations need not be acted upon by the heads of government institutions as no means of enforcement exists under the Act.\textsuperscript{64} Should the head of the government institution not give access to a record when recommended to do so by the Information Commissioner, the complainant's only recourse is the right to apply for review of the decision to the Federal Court of Canada, Trial Division.

Unlike the powers of the Privacy Commissioner, her counterpart under the \textit{Privacy Act}, the Information Commissioner is not specifically empowered to review information contained in exempt banks in order to determine whether a record is properly designated as exempt.\textsuperscript{65}

The party making the request for information, after receiving an answer to his complaint from the Information Commissioner, and third parties are entitled to have decisions reviewed in the Federal Court of Canada, Trial Division. Applications to review refusals of disclosure must be made within 45 days after the time the results of an investigation by the Information Commissioner are reported to the complainant or such further time as the court may order.\textsuperscript{66} A request for review by a third party must be filed within 20 days after notice is given of the decision made by the head of a government institution to disclose a record or where the Information Commissioner has recommended disclosure.\textsuperscript{67}

Applications for review should be commenced by notice of motion.\textsuperscript{68} The motion is required to be supported by an affidavit setting out the facts upon which the motion is based,\textsuperscript{69} although this had to be directed to be done by the court in \textit{Maislin}\textsuperscript{70} and, with respect to the existence of exempt information under the \textit{Privacy Act}, in \textit{Ternette}.\textsuperscript{71}

The hearing of an application for review is conducted in a summary manner\textsuperscript{72} and is not a \textit{de novo} review of the Minister's decision.\textsuperscript{73} The Act is unclear in regard to the test to be generally

\textsuperscript{56} Ibid., s. 28(5) and (6).
\textsuperscript{57} Ibid., s. 28(5)(b).
\textsuperscript{58} Ibid., s. 30(1).
\textsuperscript{59} Supra, footnote 9, at p. 5.
\textsuperscript{60} Access to Information Act, s. 30(2).
\textsuperscript{61} Ibid., s. 31.
\textsuperscript{62} Ibid., s. 36.
\textsuperscript{63} Ibid., s. 35(2).
\textsuperscript{64} Ibid., s. 37(5).
\textsuperscript{66} Access to Information Act, s. 41.
\textsuperscript{67} Ibid., s. 44.
\textsuperscript{68} Federal Court Rule 319(1), C.R.C. 1978, c. 663.
\textsuperscript{69} Ibid.
\textsuperscript{71} Ternette v. Solicitor-General of Canada, supra, footnote 65.
\textsuperscript{72} Access to Information Act, s. 45.
\textsuperscript{73} This is in contrast to the \textit{Freedom of Information Act}, 5 U.S.C. p. 662 (1976) where the party requesting disclosure has means of \textit{de novo} review. The third party has no status at
Once the statutory conditions in question have been met, disclosure should occur in the normal course. Although the judgment can be confined to only those instances where the Act enumerates conditions required to be met before the head of an institution may exercise his discretion to grant access, Jerome A.C.J.'s reasons apply with equal force to all the discretionary exemptions contained in the Act.

In instances where disclosure is refused on the basis of injury to the conduct of federal/provincial affairs, international affairs, the defence of Canada or the detection, prevention or suppression of subversive or hostile activities, to law enforcement or the security of penal institutions or to the financial interests of the Government of Canada, the court, on review, may determine only whether the head of the institution had reasonable grounds on which to refuse disclosure.77

In instances where review is initiated by a third party the burden of proof will lie on the party resisting disclosure.78 The Associate Chief Justice has stated, on at least two occasions,79 that in applying that burden of proof "public access ought not to be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure". 79a This would suggest that a party resisting disclosure must satisfy a criminal standard of proof. That burden of proof would appear to be difficult to apply in instances where the court need only determine whether the head of an institution has reasonable grounds on which to refuse disclosure. The court has yet to consider that burden of proof in such instances.

Considering the similar provisions contained in the Privacy Act, Strayer J. has held that the general power of review of the Federal Court entitles the court to review the alleged exempt information to determine whether the information was properly included in that bank of exempted information.80 Strayer J. did not go on to

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77 *Ibid.*, s. 50. For an excellent discussion of the role of the Federal Court in applications for review, see Rankin, *supra*, footnote 4, at pp. 31-3.
say whether the same scope of review existed for information concerning national security, etc., where the court is required to determine whether "reasonable grounds" existed to refuse disclosure.

An open court-room would appear to be an ill-suited place for hearing an application to prevent disclosure of exempted information. The Access to Information Act addresses this issue in s. 47 by providing that the Court of Review shall take every reasonable precaution to avoid disclosure of information which the head of a government institution would be authorized to refuse to disclose, including, when appropriate, receiving representations _ex parte_ or conducting hearings _in camera_. In _Maislin Industries Ltd._, the court found it appropriate to conduct the hearing _in camera_ and to restrict attendance at the hearing to counsel for the parties.

For those applications regarding national security matters, Parliament has seen fit to make mandatory _in camera_ proceedings. Applications for review by requesters or the Information Commissioner regarding a record which has been denied disclosure on the basis of ss. 13(1)(a) or (b) and 15, relating, in part, to the government or institution of a foreign state, the defence of Canada or any allied state or the "detection, prevention or suppression of subversive or hostile activities", must be heard _in camera_ and, if requested by the head of the government institution, be heard in Ottawa and by government representations made _ex parte_.

The Act is silent on the issue of whether the contents of a record sought to be disclosed ought to be disclosed to the requesting party. Whether an application for review is initiated by the requesting party or third party, the former must be given an opportunity to know the case that needs to be met. This can only be accomplished through some form of disclosure of the exempted record.

In _Reyes v. Secretary of State_, where the Federal Court considered the analogous provisions of the Privacy Act regarding _in camera_ proceedings, Jerome A.C.J. directed that the investigation sought to be disclosed by Mr. Reyes regarding the investigation and assessment of his citizenship application be appended to an affidavit, placed in a sealed envelope and filed with the court. Before the court would review the record _ex parte_, Jerome A.C.J. invited counsel for the applicant to suggest specific questions which would be asked of deponents during the _ex parte_ hearing.

Parliament has seen fit to exclude the attendance of client or counsel in "national security" matters. In all other instances the requesting party, or solely his counsel as in _Maislin Industries Ltd._, may hear representations made by other parties concerning potentially confidential information. In _Maislin Industries Ltd._, Jerome A.C.J., having examined the full text of the study, allowed disclosure of the record in issue to Mr. Hunter's counsel on his undertaking of non-disclosure, even to his client. Jerome A.C.J. concluded that this kind of determination will vary with the circumstances of each case.

One can reasonably conclude that in circumstances concerning national security matters, no disclosure of the record will be available to counsel for the requesting party. However, without some form of disclosure counsel cannot argue intelligently whether the information falls within any of the exempted categories. It can be reasonably forseen that, in instances where disclosure of exempted information is required in the public interest as it relates to public health, safety or protection of the environment, expert evidence regarding those subjects must be adduced. Certainly the public interest requires a more rigorous inquiry into the nature of a document which will otherwise be exempt from disclosure pursuant to the third party exemptions, than the kind of inquiry that will result where counsel for the requesting party receives no particulars regarding the contents of the exempted document.

A minimum standard of disclosure ought to be instituted by the Federal Court of Canada. A reasonable standard was that adopted by Wilkey C.J. in _Vaughn v. Rosen_ where the Chief Justice ordered an index of the document sought to be disclosed to be provided to the requesting party and the court. The particulars of the index should be sufficient to inform the requesting party and the court of the nature of the document while keeping confidential the matters sought to be disclosed. The judge, in each instance,

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81 Access to Information Act, s. 52.
82 Supra, footnote 79.
83 Supra, footnote 78.
84 See, for instance, _Reyes_, supra, footnote 79.
85 Access to Information Act, s. 20(6).
86 484 F.2d 820 (1973).
87 Ibid., p. 825.
should have an opportunity to fully review the record and may amend the index to ensure its accuracy and completeness.\(^{88}\)

A last area of concern to the practitioner is the matter of costs. Any successful party to an application for review is entitled to costs unless the court otherwise orders.\(^{89}\) Where a complainant or the Information Commissioner has appealed a refusal to disclose and the court is of the opinion that an important new principle has been raised in relation to the Act, the court must order that costs be awarded in favour of the applicant even if unsuccessful.\(^{90}\) It is fair to presume that in appropriate cases where a third party applicant has unsuccessfully applied for review and has raised an important new principle in relation to the Act, the court would exercise its discretion pursuant to s. 53(1) and make an order for costs in favour of the third party.

If the Information Commissioner has appealed a decision to refuse disclosure of a record or otherwise appears on behalf of a complainant who has applied for review, a complainant need not likely worry about the matter of costs.

**Conclusion**

The advent of the *Access to Information Act* has invoked a new age in government responsibility. Its effectiveness as a tool for disclosure of information in the hands of government is in some doubt but there is no doubt that the Act is being successfully used by many persons.\(^{91}\) Presently, the Act is undergoing mandatory comprehensive review\(^{92}\) by the House of Commons Standing Committee on Justice and Legal Affairs pursuant to which recommendations will be made to Parliament regarding the Act. Hopefully some of the procedural impediments to disclosure such as costs and the Access Register will be addressed as will be the more important issue of mandatory and discretionary exemptions from disclosure. In the meantime, the Act remains a valuable tool for those practitioners whose clients may be better served by obtaining that extra piece of evidence or information which would otherwise not be available.

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\(^{88}\) Such a procedure would seem to be in conflict with the discretion accorded to heads of government institutions pursuant to s. 10(2) of the *Access to Information Act*, which provides that they are not required to indicate to a requester whether a record exists, upon a request for information. It is submitted that such a provision makes no sense in the context of an application for review before the Federal Court. This provision should be confined to the initial step of the access request when the head of a government institution refuses to give access to a record and considers it necessary, in the public or private interest, to not indicate whether the record exists.

\(^{89}\) *Access to Information Act*, s. 53(1).

\(^{90}\) *Access to Information Act*, s. 53(2).


\(^{92}\) *Access to Information Act*, s. 75(2).