



March 20, 2018

The Honourable Scott Brison, P.C., M.P.
President of the Treasury Board
90 Elgin Street
Ottawa, Ontario K1A 0R5

Dear Minister:

We are writing to you with regard to the privacy provisions of Bill C-58 and their potential adverse impact on our offices. Overall, we are pleased that the government is taking concrete steps to modernize the *Access to Information Act* (ATIA) and furthering the goals of transparency and openness, which are fundamental to preserving a healthy democratic system. Nonetheless, as you know, both of our offices have some concerns relating to provisions that touch on the intersection of our mandates. We are taking this opportunity to inform you of proposals we have jointly developed for a more positive way forward.

Ultimately, our goal is to avoid unnecessary delays in providing access under the ATIA regime while at the same time ensuring that the Office of the Privacy Commissioner (OPC) is engaged in an appropriate and timely manner to protect privacy rights when personal information is at play.

Privacy Commissioner's right to make representations

It is our joint submission that the ability of the Information Commissioner to receive representations from or consult the Privacy Commissioner should be adjusted in order to address concerns raised by the Privacy Commissioner where both privacy and access rights are at play, and must be appropriately balanced in all circumstances.

Firstly, in our view there should be a mandatory requirement for the Information Commissioner to consult the Privacy Commissioner whenever she intends to make an order to disclose information that has been exempted under the personal information exemption.

Secondly, the Information Commissioner should have a discretionary ability to consult the Privacy Commissioner at any stage during her investigation of an access complaint, in circumstances that the Information Commissioner deems necessary or advisable. An MOU between the two offices would define specific privacy-related issues or circumstances for which consulting the Privacy Commissioner would be advisable.

Accordingly it is our proposal that clause 16 of Bill C-58 be amended as follows:

Consulting Privacy Commissioner

36.2 (1) ~~If~~ When the Information Commissioner intends to make an order requiring the head of a government institution to disclose a record or a part of a record that the head of the institution refuses to disclose under subsection 19(1), the Information Commissioner ~~shall~~ may consult the Privacy Commissioner and may, in the course of the consultation, disclose to him or her personal information.

(2) The Information Commissioner may consult the Privacy Commissioner regarding the application of section 19 as the Information Commissioner deems necessary or advisable to assist in the investigation of a complaint under this Part, and may, in the course of the consultation, disclose to him or her personal information.

As a result of these amendments, consultation of the Privacy Commissioner by government institutions would become redundant. Therefore, we also propose that clause 14 of Bill C-58 be amended as follows:

Right to make representations

35 (2) In the course of an investigation of a complaint under this Part by the Information Commissioner, a reasonable opportunity to make representations shall be given to

[....]

(d) the Privacy Commissioner, if the Information Commissioner consults him or her under section 36.2 ~~or the head of the government institution concerned notifies him or her of the complaint.~~¹

These amendments would maintain the Information Commissioner's independence and her ability to fulfill her statutory mandate in an efficient way, while ensuring that the Privacy Commissioner is engaged when the personal information exemption is being applied by institutions and challenged by the Office of the Information Commissioner of Canada (OIC).

¹ As a result of the proposed amendment to Clause 14, we further propose a technical amendment to Clause 48 of Bill C-58, amending subsection 22.1(1) of the *Privacy Act*, to remove the words "or as the result of being notified by the head of a government institution that a complaint has been made under Part 1 of that Act."

Provision of report of findings to the Privacy Commissioner

In addition, we propose that clause 17 of the Bill be amended so that the Information Commissioner is required to provide a final report of the results of an investigation to the Privacy Commissioner in instances where he has been consulted and the Information Commissioner and the Privacy Commissioner are in disagreement regarding the application of section 19. This also broadens the Privacy Commissioner's right to judicial review (per subsection 41(4) and section 41.2 of the ATIA).

Our proposed amendments to the Bill in this respect, together with some paragraphing for the sake of interpretive ease, are as follows:

Final report to complainant, government institution and other persons

37 (2) The Information Commissioner shall, after investigating a complaint under this Part, provide a report that sets out the results of the investigation and any order or recommendations that he or she makes to:

- (a) the complainant;
- (b) the head of the government institution;
- (c) a third party that made representations to the Commissioner under paragraph 35(2)(c) in respect of the complaint, and
- (d) the Privacy Commissioner where he or she was consulted under paragraph 35(2)(d) and made representations to the Information Commissioner, and where the Commissioners are not in agreement over the application of section 19, if the report sets out an order requiring the head of the government institution to disclose a record or a part of a record that the head of the institution refuses to disclose under subsection 19(1)

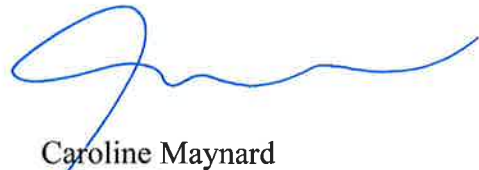
(2.1) Despite subsection (2), no report is to be made under this section and no order is to be made until the expiry of the time within which the notice referred to in paragraph (1)(c) is to be given to the Information Commissioner.

Taken as a whole, we believe these series of recommendations will address the concerns both offices have raised and appropriately balance Canadians' rights to both privacy and timely access.

We appreciate your consideration of our proposals and any efforts that you can make to direct them for appropriate parliamentary consideration. Please be advised that it is our intent to make these same recommendations before the Senate committee tasked with reviewing Bill C-58.

We would be pleased to discuss this matter further at your convenience. If your staff requires further information, please do not hesitate to contact Julia Barss, Director of Legal Services, 819-994-5880 at the OPC and Gino Grondin, A/Deputy Commissioner, Legal Services and Public Affairs, 819-994-0008 at the OIC.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Caroline Maynard', with a long horizontal flourish extending to the right.

Caroline Maynard
Information Commissioner

A handwritten signature in blue ink, appearing to be 'Daniel Therrien', with several loops and a short horizontal line at the end.

Daniel Therrien
Privacy Commissioner

c.c.: Secretary to the Treasury Board
Senator Pierrette Ringuette