An Introduction to the *Access to Information Act* and its Potential Impacts on IFAs

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Prepared by Pascal Jolicoeur

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For Prof. Leonard Brooks

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Objectives

This research paper will look at how the federal *Access to Information Act* impacts the day-to-day activities of an Investigative Forensic Accountant (IFA) engaged by entities subject to the Act. There appears to be differences and discrepancies in the way mandates are conducted and documented between those mandates subject to the Act and those that are not. The differences consist of the way confidentiality is handled, rather than how the work is done. It is important to note that each province and many municipalities have their respective equivalents of the *Access to Information Act*, meaning that for each level of government, a slightly different version of the Act may be applied. As a result, for each engagement conducted for these entities, the IFA will need to consider the specific implication of the relevant act.

In order to demonstrate the impacts of the Act, this paper will review the relevant sections of the Act and will examine different scenarios that will validate the significance of these sections on how an IFA conducts their work. Using commonly adopted procedures and policies utilized by IFAs, this paper will demonstrate how conflicts can arise between the Act and the adopted policies. This paper will review such policies and procedures, outlining the problematic areas and proposing potential solutions.

The objective of the research will be to explain the issues faced by IFAs with respect to the Act, offer potential solutions where they exist, and caution the reader on areas that are still problematic and deserve attention beyond the scope of this research paper.

The ideas, scenarios and suggestions presented in this research paper should not to be considered legal advice. The views and interpretations, unless otherwise stated, are solely those of the author and are for discussion purposes only. Similar cases, or those pertaining to the problematic issues outlined in this paper, should be carefully examined on an individual-basis by legal professionals or consultants.

Research Scope

This research paper focuses on the impacts the *Access to Information Act* has on the day-to-day activities and operations of IFAs working on engagements with government institutions. (A complete list of government institutions subject to the Act has been provided in Appendix A.)

In order to properly address the issue and determine the impacts of the Act on an engagement and the IFA, extensive case law research was performed. Interviews were also conducted with practicing IFAs and others in order to determine how they deal with the obstacles and challenges presented by this specific piece of legislation. (Appendix C includes the list of individuals interviewed for this research paper.)

Summary of Findings

The spirit of the *Access to Information Act* is about openness, transparency, accessibility to Canadians and accountability. According to the Information Commissioner[1], the Act is, overall, a good piece of legislation because it provides an initial access point to government information. However, in light of recent events, the Minister of Justice feels that the Act needs to be modernized. The Act is over 20 years old and continues to evolve, most recently with the amendments made in the spring of 2006.

Although the Act provides a vehicle for Canadians to remain informed of government dealings and participate meaningfully in the democratic process, the problems, such as government secrecy, remain the same as they were before the Act became law. Oftentimes, bureaucrats prefer to disclose as little as possible, and in certain cases, will do everything in their power to stonewall the disclosure of potentially damaging information.

It goes without saying that government institutions are the country's largest consumers—from military goods to project management services and performance reports—government organizations spend a great deal of the nation's wealth. In a democratic society where competition is encouraged, suppliers of goods and services find themselves subject to the rules and regulations applicable to these government institutions. Suppliers

[1] Remarks by Honourable John M. Reid, P.C. "A Commissioner's Perspective – Then and Now," Toronto, Ontario, October 6, 2005.

currently face the possibility of having their documents and reports provided to the government become subject to disclosure under the *Access to Information Act*.

The courts have been generally consistent in applying the Act over the years, but they are constantly faced with new scenarios that demand interpretation under the broad scope of the Act and its narrowly defined exemptions.

The increasing number of large litigation cases also attracts more attention from the media and the general public. When records are made public, either by disclosure through the Act or through litigation, the margin for error is minimal at best. Also, protection of confidential information may be compromised.

Despite the Act's history and continuous changes, IFAs, like every other supplier, are also faced with the possibility of having the records they have submitted to government institutions make their way into the public arena. The struggle to ensure confidentiality remains an ongoing process, both proactively and reactively.

Introduction

The day is September 29, 2004 and a partner from an accounting firm, takes the stand at the Sponsorship Commission, presided by Mr. Justice John H. Gomery.[2] This was the day which the partner's professional credibility and reputation were brought into question.

The partner was asked to explain the differences between her firm's 1996 draft report and the final report that had initially looked into the mismanagement of the advertising funds at Public Works and Government Services Canada (Public Works). In this particular case, the draft report was presented to opposing counsel not by way of a request for access, but because Public Works had retained a copy of the draft report.

In the first draft report, the auditors from the accounting firm noted that the problems within the advertising program were widespread within that group of Public Works. In fact, draft report stated, "Our audit findings reveal non-compliance to policies and procedures on a consistent basis. Fortunately, no legal action or public attention has resulted from this deviation thus far. In order to avoid potential embarrassing situations, it is best to address the issue immediately."[3] When the draft was compared with the final report, the final report only mentioned "instances of non-compliance" to government rules and did not address the need for immediate action.

[2] Leblanc, Daniel. *The Globe and Mail*. "Judge lashes auditors at sponsorship probe," Ottawa, Ontario, September 30. 2004.
[3] Ibid.

In another instance, the first draft stated the scope limitations, which were to evaluate the advertising branch's compliance with existing regulation rather than try to find potentially fraudulent transactions.[4] (It should be pointed out that this statement is fairly standard in audit engagement letters. The problem arises when the statement is removed after a conversation with the client, which is what happened in this firm's final report.)

These discrepancies led Gomery J. to make the following statement: "You didn't rewrite it, you watered it down. You watered it down very, very considerably. You left out the reference to 'on a consistent basis.' You left out the reference to the immediacy of addressing the problems. You left out the potential for embarrassment. Why did you water it down?"[5] This question was one that the partner was not able to answer.

In this case, the draft report did not get to opposing counsel by way of a request for access, but it could have happened. Legal counsel had a copy of the draft report because Public Works had a copy of it and it would most likely have been disclosed under the Act.

In today's business environment, frauds and scandals are being reported in greater numbers and are dominating press coverage. It seems that, more and more, the work of IFAs is required to shed light on these complicated schemes, but at what price? Reports provided by IFAs will be tested in the courts and scrutinized by the general public. The slightest mistake can spell the end of a career. The *Access to Information Act* largely

[4] Ibid.
[5] Ibid.

dictates what information will make its way to the public arena—and information generated by IFAs is not exempt from this act.

A Brief History of the Act

In order to fully appreciate this piece of legislation, it is important to understand where it comes from, how it evolved and what purpose the *Access to information Act* serves.

Canada is one of the first 12 countries in the world to give its citizens the legal right to access government information. Sweden was actually the first country to enact a similar law, back in 1766, and in 1949, it found its way in the country's constitution. Finland in 1951, the United States in 1966, Denmark and Norway in 1970, and France in 1971 all introduced similar legislation that was aimed at reducing government secrecy and attempted to set some sort of standard for government accountability.

In Canada, the passing of such legislation enjoyed a rather rocky start. The first Canadian *Access to Information Bill* (Bill C-43) was introduced in April 1965, by Barry Mather, a New Democratic Party Member of Parliament (MP). Over the next decade, on four separate occasions, the Bill reached second reading, but was never approved beyond that point. In 1974, a similar bill by the Progressive Conservative party, presented by Gerald William "Ged" Baldwin, received second reading but was sent off to a committee for further examination, where it stalled and, finally, was never enacted.

Bill C-15 was introduced in 1979 by Joe Clark's minority Progressive Conservative government, but it also never received royal assent. This time, the reason was because the minority government was dissolved.

In 1980, under the Trudeau administration, another bill was introduced, received second reading in January 1981, and was then studied by the Standing Committee on Justice and Legal Affairs. The current *Access to Information Act* was granted Royal Assent in July 1982 and came into force on July 1, 1983.

Each province now has its own version of the *Access to Information Act*. (In fact, Nova Scotia, New Brunswick, Newfoundland and Labrador and Quebec all passed their provincial acts before the federal act became law.) The Ontario act, for example, is called the *Freedom of Information and Protection of Privacy Act*. Furthermore, many municipalities abide by municipal acts, such as the *Municipal Freedom of Information and Protection of Privacy Act*, which governs the municipalities of Ontario.

The idea behind the Acts (federal, provincial or municipal) is to ensure that government records are made available to the general public when requested, as long as the request does not fall within an exception under the act in question. In other words, this act is supposed to ensure some level of transparency between the government and the general public.

The purpose of the *Access to Information Act* establishes the right of the public, as defined in Section 4 of the Act,

> *to access information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of government information should be reviewed independently of government.*[6]

As history demonstrates, this piece of legislation has been the cause of many debates and arguments. On the one hand, the press and the general public pressure the government to release as much information as possible. On the other hand, the government is reluctant to disclose too much information, claiming that a certain level of secrecy needs to be maintained in order for the government to function properly.

In light of the Sponsorship Inquiry presided over by Gomery J.; the potentially damaging report from the Auditor General on the Gun Registry costs; and the "Société des alcools du Québec" price-rigging scheme by senior officers, combined with Canada's second minority government in a row; the debates for a more transparent government are not uncommon in the news. A review of the Act began when former Prime Minister Paul Martin was in office, and continues today with Prime Minister Stephen Harper. Both

[6] *Access to Information Act*, (R.S., 1985, c. A-1), Purpose of Act, Section 2 (1).

parties want to demonstrate an increased level of transparency of government dealings, without hindering the proper functioning of the government.

The Honourable John M. Reid is the current Information Commissioner of Canada. He was appointed to this position on July 1, 1998, for a seven-year term (which expired on June 30, 2005 with a temporary re-appointment that is currently ongoing). The responsibility of the Information Commission is to investigate complaints from applicants and report to the government, while the Minister of Justice has the responsibility to ensure that access is granted or denied, based on the provisions of the Act, despite its potential flaws.

In a speech that Mr. Reid made in Toronto on October 6, 2005, he noted reforms to the Act are long overdue. Based on his first impressions, he states that, in 1998:

- A strategy of delay was in widespread use by the bureaucracy, to deny and control access to government-held information. In 1998, 55% of the complaints to the Commissioner were with respect to failure to meet statutory response deadlines.
- The stubborn persistence of a culture of secrecy in the Government of Canada owed much too weak leadership, not just on the part of leaders of government and public service, but also on the part of Parliament.[7]

[7] Remarks by Honourable John M. Reid, P.C. "A Commissioner's Perspective – Then and Now," Toronto, Ontario, October 6, 2005.

Mr. Reid also stated that these concerns remain at the forefront of the challenges for the next seven years. In other words, the problems that were prevalent in 1998 are still rampant today. According to the Office of the Information Commissioner's website, most requests should be completed within 60 days, but as it will be demonstrated later, the process often goes beyond that time frame.

The Office of the Information Commissioner no longer reports to the Justice Committee and has not since 2002. In an article published by Canada NewsWire Ltd. on April 13, 2002, both journalists and members of the public chose the Department of Justice as the most secretive department in Canada. The article accuses the federal Department of Justice of giving itself the power to override the *Access to Information Act* and withhold information relating to various records under Bill C-36.[8] According to Robert Cribb, President of the Canadian Association of Journalists, "Bill C-36 is an extraordinary infringement on access to information rights in Canada."[9] According to the interpretation of Bill C-36, the Attorney General would have the power to cut the flow of information to the general public at any time.

The Office of the Information Commissioner currently reports to the Standing Committee on Access to Information, Privacy and Ethics—a committee formed after the minority Liberal government won the election in 2004. Along with this election, a bill proposed

[8] Bill C-36, the government's anti-terrorism legislation, amended various pieces of legislation, including the *Access to Information Act*. Part 5, Section 87 of the Bill states:

> *"The Access to Information Act is amended by adding the following after section 69:*
> *Prohibition certificate: 69.1 (1) The Attorney General of Canada may at any time personally issue a certificate that prohibits the disclosure of information for the purpose of protecting international relations or national defence or security.*
> *Prohibited information: (2) The Act does not apply to information the disclosure of which is prohibited by a certificate under subsection (1)."*

[9] Canada NewsWire Ltd. "Federal Ministry of Justice wins 2nd annual Code of Silence Award," Ottawa, Ontario, April 13, 2002.

by MP John Bryden, requesting a broad overhaul of the Act, saw its end. After the election, the Bill was revived by MP Pat Martin, of the New Democratic Party (NDP). After discussions with the Minister of Justice (at the time Irwin Cutler), Mr. Martin agreed to stop pursuing his private bill, as the Minister of Justice had decided to introduce a government bill true to the principles of Mr. Martin's bill.

In April 2005, the Minister of Justice appeared before the Standing Committee and announced that, instead of tabling a bill, he had decided to issue a 'discussion paper'—*A Comprehensive Framework for Access to Information Reform*. The purpose of his research paper was to suggest that a parliamentary committee first study the major issues concerning information access before developing draft legislation. As a result, the Standing Committee asked the Office of the Information Commissioner to draft a reform bill for the committee to consider.

During his speech mentioned earlier, Mr. Reid also explained that, after much research, he was now opposed to the proposition to merge the offices of the Information and the Privacy Commissioners, despite his support for the idea in 2003.

Based on this short review of events over the last few years, it is easy to see how the impacts of the Act have been cause to create tension between groups. On the one side, there are government officials trying to keep as much information as possible secret, whether justified or not, claiming that disclosure will hinder the proper functioning of the government. On the other side, there is the Canadian Association of Journalists, claiming

that government officials are abusing the Act and ignoring requests in order to hide their abuse of powers and cover up embarrassing events and dealings.

Sections and Definitions Under the Act

In order to properly understand the impacts the Act have on an IFA's work, one must first understand the Act. Here are some of the key terms used within the Act under Section 3:[10]

> Record: i*ncludes any correspondence, memorandum, book, plan, map, drawing, diagram, pictoral or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof.*

Based on this definition, records include day-planners, notebooks, computer hard drives and recordable media, e-mails, drafts and files.

> Third party: *in respect of a request for access to a record under this Act, means any person, group of persons or organization other than the person that made the request or a government institution.*

With respect to IFAs, this definition includes legal counsel, including opposing counsel, other experts and competitors.

[10] *Access to Information Act*, (R.S., 1985, c. A-1), Interpretation, Section 3.

Section 4(1) further defines who has a right to access by stating;

> *…every person who is*
>
> *(a) a Canadian citizen, or*
>
> *(b) a permanent resident within the meaning of subsection 2(1) of the* Immigration and Refugee Protection Act,
>
> *has a right to and shall, on request, be given access to any record under the control of a government institution.*

Under this definition, a resident also includes resident corporations and partnerships. Canadian citizens and permanent residents have a right to be given access to information, under the control of a government institution. This right extends beyond information that has been generated by or for the government. This right applies to *all* information under the control of a government institution.

The term *control* is not specifically defined under the Act. However, Section 4(3) defines *records produced from machine-readable records*,[11] stating that

> *For the purposes of this Act, any record requested under the Act that does not exist but can, subject to such limitations as may be prescribed by regulation, be produced from a machine readable record under the control of a government institution using computer hardware and software and technical expertise*

[11] *Access to Information Act*, (R.S., 1985, c. A-1), Access to Government Records, Section 4(3).

normally used by the government institution shall be deemed to be a record under the control of the government institution.

In other words, documents in the recycle bin of a computer or the deleted folder of an e-mail box are still deemed to be a record under the control of the government institution. There are instances where individuals will simply not clean out those folders, generating years of information that is still obtainable under the Act.

The terms and conditions of a Request for Proposal (RFP) should be closely reviewed. Often, proprietary clauses will be included and will determine which party has control over what information. Such clause often read as follows:[12]

- *"Client (government institution) claims rights to proprietary methodologies or know-how that the firm will use to carry out the engagement."*
- *"Client claims ownership of firm produced working papers, deliverables and reports and restricts ability of the firm to retain working papers or copies of engagement documents."*
- *"Ability for the client to make alterations to the report without the firm's permission."*

If IFAs agree to these terms and conditions at the RFP level, any arguments against disclosure will be ineffective as the IFA no longer has control over the documents.

[12] The clauses were gathered from internal use proprietary documents, but similar clauses can be found in RFPs available through MERX.

Discussions with the client and legal counsel should take place before the bid is submitted and the risk of disclosure should be properly evaluated.

Understanding Exceptions of the Act

Sections 6 to 11 of the Act describe the procedures to follow in order to request access to information. This process will be reviewed at a later point in this paper. Sections 13 to 25 of the Act outline the exemptions that allow government institutions to refuse access to information. It is over these particular sections that the debates regarding information accessibility take place. For example, Section 14 states[13]

> *The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs, including, without restricting the generality of the foregoing, any such information*
>
> *(a) on federal-provincial consultations or deliberations; or*
>
> *(b) on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial affairs.*

The remaining exemption sections of the Act cover international affairs and defence, law enforcement and investigations, security, policing services, safety of individuals, economic interests of Canada, personal information as defined in Section 3 of the *Privacy Act*, operations of the Government, and third-party information. For the purpose of this

[13] *Access to Information Act*, (R.S., 1985, c. A-1), Exemptions, Section 14.

report, Section 20, which deals with third-party information; and Section 23, solicitor–client privilege, are most relevant.

Section 20(1) of the Act[14] states

> *Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains*
>
> *(a) trade secrets of a third party;*
>
> *(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;*
>
> *(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or*
>
> *(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.*

The first exception of disclosure deals with information that meets the definition of 'trade secrets' below. As for the other three exceptions, if disclosing the information is in the public's best interest, benefits public safety or protection of the environment, the Head of an institution may choose to disclose the information. For example, during the Gomery

[14] *Access to Information Act*, (R.S., 1985, c. A-1), Third Party Information, Section 20.

Commission, it was in the public's financial interest for government files with respect to "Groupaction" to be released, even though it may have hurt the commercial advantage of the company. It is important to note that the concept of public interest does not apply to trade secrets.

The Act does not give much guidance on the interpretation of trade secrets, but the *Freedom of Information and Protection of Privacy Act* of British Columbia[15] defines the term as

> *information, including a formula, pattern, compilation, program, device, product, method, technique or process, that*
>
> *(a) is used, or may be used, in business or for any commercial advantage,*
>
> *(b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,*
>
> *(c) is the subject of reasonable efforts to prevent it from becoming generally known, and*
>
> *(d) the disclosure of which would result in harm or improper benefit.*

This definition is important with respect to the methods, techniques or processes that may be used by one IFA in conducting his or her forensic work, which may not be utilized by other IFAs. For example, if an IFA has developed a method or process of investigating

[15] *Freedom of Information and Protection of Privacy Act*, (RSBC, 1996), Chapter 165, Schedule 1, Definitions.

or documenting certain aspects of an investigation, which significantly reduces the time required to perform an investigation, then this procedure may be provide considerable advantage where bids are to be tendered for government engagements. There would be a commercial advantage over the competitor and an economic value to the IFA. If such a method or process were to be made public knowledge, then this could potentially harm the IFA in question. Further in this report, there is a case (PricewaterhouseCoopers, LLP versus the Minister of Canadian Heritage) that will demonstrate how this section of the Act can be applied to the disclosure of trade secrets.

Section 23 of the Act is fairly short, but this paper will demonstrate how this section has significance in determining the approach of an IFA's work. In fact, it states that "The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor–client privilege."

The solicitor–client privilege is a fundamental concept to the Canadian legal system as demonstrated by the courts over the years. In order to maintain public confidence and ensure the relevance of this privilege, this concept should be as absolute as possible. In order to understand the meaning of solicitor–client privilege, one can look at the *Descôteaux* case,[16] which states that

1. *The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.*

[16] *Descôteaux et al. v. Mierzwinski,* [1982] 1 S.C.R. 860, page 875.

2. *Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.*
3. *When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.*
4. *Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.* [Emphasis added.]

Clearly, infringing on the solicitor–client privilege is taken very seriously by the Courts and this concept will be an important factor to consider later in this paper.

There is one more section worthy of mention before continuing with this research paper, as this section gives third parties the tools to plead their cases and argue why records should not be disclosed. Section 44 of the Act [17] states that

(1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of decision to

[17] *Access to Information Act*, (R.S., 1985, c. A-1), Review by the Federal Court, Section 44.

> *disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.*

There are numerous other sections of the Act that deal with complaints, investigations, reports to parliament, review by the Federal Court, the Office of the Information Commissioner and offences. However, for the purpose of this research paper, these sections will not be reviewed in detail.

Practical Problems

This section of the report looks at common problems that IFAs face on a daily basis when dealing with government institution engagements. Most of these problems were identified during discussions with various IFAs currently in practice (mostly partners, principals and senior managers).

Extensive research on various cases involving IFAs and the *Access to Information Act* was performed during the preparation of this paper, however very few cases pertaining to the problems encountered by IFAs were found. Thus, in order to demonstrate the potential problems that can surface, this paper proposes the following hypothetical scenarios.

Bids

The first step to obtaining a government engagement is to respond to a Request for Proposal (RFP). For those not aware of what an RFP comprises, these documents can be fairly lengthy, sometimes surpassing over 100 pages. A typical RPF will include components such as certifications, conditions of eligibility, financial viability and a description of the firm, along with a list of personnel, the firm's experience and methodology.

Clearly, there is a lot of information within an RFP that a firm would not want disclosed to the general public, or more specifically, a competing firm. Sections like financial viability, a description of the firm (if the information is not already publicly known), the personnel list, the firm's experience and most importantly, the methodology are areas that, unless they qualify as exceptions under Section 20(1) of the Act, could have an adverse effect on the firm and its ability to remain competitive.

Hypothetical Scenario – Part I – Bids

Suppose that government institution (the client) puts out an RFP for investigative work. The Agency received a tip from a whistleblower line claiming that funds provided to a research organization are being misappropriated by an individual. In this case, only two firms reply to the proposal, Firm W and Firm L. In terms of charging rates, the two firms are similar. However, the methodologies used by the two firms differ. Firm W describes how it intends to analyze the disbursements. Based on the methodology, Firm W has a significant advantage over Firm L as the data- entry process will be much faster and the

data-manipulation tool is much more efficient. Results of the analysis will be available in a much shorter timeframe. As a result, Firm W is awarded the engagement.

In order to comply with its quality assurance policy, Firm L follows up on all unsuccessful proposals in order to improve the firm's bidding skills. Part of the review process consists of requesting, under the *Access to Information Act*, that the government institution provide a copy of all the bids that were tendered to the Agency, which in this case includes the bid from Firm W.

This example will be used to illustrate the process under which Firm L would request information from the government institution.

On June 1, under Section 6 of the Act, Firm L files a formal request with the government institution to obtain a copy of all the bids that were submitted for the above-mentioned RFP. Section 27(1) states that if the head of a government institution intends to disclose any record under the Act that may contain, or that the head thinks may contain trade secrets of Firm W, information described in the Act under Paragraph 20(1)(b) or information that the head of the institution can reasonably foresee might affect a result under Paragraph 20(1)(c) or (d), the head of the institution must give written notice to Firm W within **30** days after the request is received.

The notice must state that the head of the institution intends to disclose the bid, or part of it and that it contains information under Paragraph 20(1), a description of the content of

the record and that Firm W may, within **20** days after the notice is given, make representation to the head of the institution as to why the record or part of it should not be disclosed.

Once Firm W receives the notice from the head of the institution, the firm has two choices: The first choice is to consent to the release of information. The second choice is to make representation to the head of the institution in writing, or if required, in an oral statement. Under Section 28(1), the head of the government institution must make a decision as to whether or not disclose the record and give written notice of the decision to the third party. In this case, Firm W received a notice stating that the head of the government institution will disclose the information. Under Section 44 of the Act, within **20** days of that notice, Firm W can apply to the Court for a review of the matter.

Once the matter reaches Federal Court, the Court will review all the record under control of the government institution, and no records can be withheld from the Court. The Court will take every precaution against disclosing any information. In this case, the burden of proof lies with the third party. The standard of proof, with respect to applications under Section 20(1) is the civil standard (i.e.: proof on a balance of probabilities).[18] Once the Federal Court has rendered its decision, Firm W can, under the *Federal Court Act*, go to appeal. This scenario goes beyond the scope of this example, but as one can see, the process can take, at a minimum, 70 days before reaching the Federal Court.

[18] *PricewaterhouseCoopers, LLP v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No 1439 (QL) (F.C.T.D.).

After numerous attempts to get an opinion on this hypothetical situation with the Information Commissioner's Office, the result of this situation remains unknown. The general consensus was, however, that the cost of the forensic audit would have to be disclosed, but the confidentiality surrounding the firm's financial viability, a description of the firm (if the information is not already publicly known), the personnel list, the firm's experience and the methodology would likely not be disclosed. The Information Commissioner's Office would not officially comment on this scenario as this would be a decision of the Courts.

Based on this example, it is clear that an understanding of how the Act works is essential, even when simply answering to an RFP. If Firm W was not aware of the procedure or the time delays, the head of the government institution would have released the bid to Firm L. The consequences of such a release of information could have been very damaging for Firm W. From disclosure of competitive advantage to methodology, Firm L would have a significant advantage over Firm W in bidding for the next RFP.

Draft Reports

The retention of draft reports or review notes has long been a debate within accounting firms. The list of pros and cons for retaining such documents is very long and is a subject that will not be covered in this paper. Continuing with the above example, one might assume that Firm W has adopted the policy of *not* retaining review notes and draft reports.

Hypothetical Scenario – Part II – Reports

Once Firm W was informed that their services had been retained by the government institution, an initial meeting between the two organizations to further discuss the details of the engagement was set up. Firm W was informed that their mandate was to determine whether or not funds had been misappropriated, and if so, how and by whom. The firm's objective was to determine how much was misappropriated, to recover as much of the misappropriated funds as possible, and to offer litigation support to the client if legal counsel decided to lay criminal charges in the event of a fraud. It was determined by Firm W that this engagement would be treated as a potential litigation case and that the government institution's legal counsel should be kept informed of evidentiary developments throughout the engagement.

After three months of investigative work, Firm W was ready to present its first draft report to legal counsel. Legal counsel and the government institution reviewed the draft report, making various changes and clarifying various points. One month and three draft reports later, Firm W submitted the final report to the client. In the final report, Firm W

demonstrated how Mr. Smith, an employee of the client responsible for approving disbursements, was involved in a kickback scheme and had misappropriated approximately $2 million over the last two years. According to their policy, Firm W cleaned their files and disposed of all remaining draft versions of the report.

The client decided to suspend Mr. Smith and informed the Royal Canadian Mounted Police (RCMP) of the allegations. One year later, after a review of the case by the RCMP, fraud charges were brought against Mr. Smith. Mr. Smith pleaded not guilty to the charges and his legal counsel retained forensic experts, Firm L, to review Firm W's work.

No strangers to the procedure, Firm L requested, under Section 4 of the *Access to Information Act*, all the information that the government institution had with respect to this case, including among other things, the draft reports from Firm W.

There are two important aspects to look at during this scenario. The first aspect is the one of solicitor–client privilege and the second is the impact of a draft report resurfacing in court. Order M-521 (signed by Inquiry Officer Laurel Cropley on May 10, 1995) brings up an interesting point. The following review of this order may help prevent draft reports from resurfacing in court.

In 1995, under the *Municipal Freedom of Information and Protection of Privacy Act*, a former employee, requested from the Corporation of the City of Oshawa, various copies

of records pertaining to the position of City Manager, and records respecting the engagement of a named forensic accounting firm.[19] In this case, the Inquiry Officer reviews the requirements for documents to qualify under the solicitor–client exemption. Section 12 of the *Municipal Freedom of Information and Protection of Privacy Act* [20] is more specific than Section 23 of the *Access to Information Act*. In fact, it states

> *A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.* [Emphasis added.]

Essentially, there is a second part in the municipal act that is not present in the federal act (emphasis added above). In order for a record to qualify under the first part of the exemption, and therefore under the federal act, the following four criteria must be satisfied:

(1) there must be a written or oral communication;

(2) the communication must be confidential in nature;

(3) the communication must be between a client (or his agent) and a legal adviser; and

(4) the communication must be directly related to seeking, formulating or giving legal advice, or

[19] The Corporation of the City of Oshawa, Order M-521, Appeal M-9400541. Signed on May 10, 1995.
[20] *Municipal Freedom of Information and Protection of Privacy Act*, (R.S.O. 1990), Exemptions, Section 12, Solicitor-client privilege.

> *(5) the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.*[21]

In this case, all confidential communications from legal counsel to the Mayor and/or members of the City Council that were directly related to the seeking, formulating or giving of legal advice would be exempt from disclosure.

Records from the forensic accounting firm that detailed the activities of the investigating team, such as correspondence with counsel, invoices and information relating to the details of the investigation (presuming this information was included in the report) would be exempt under the second component of Section 12, the component that is not present in the *Access to Information Act.*

Based on this order, if the report was not exempt under the first section, this implies that it would have been disclosed under the *Access to Information Act.* To further support this conclusion, the hypothetical scenario presented in this report deals with fraud allegations. It is in the defendant Mr. Smith's best interest to gain access to the drafts as his liberty is on the line. Therefore, for the purpose of this scenario case, imagine that the draft reports were disclosed to Firm L, despite Firm W's best efforts to have them exempted.

During the third week of the trial, the partner in charge of the file, Mr. Wright from Firm W, began his testimonial. Counsel for the client questioned Mr. Wright about the report,

[21] The Corporation of the City of Oshawa, Order M-521, Appeal M-9400541. Signed on May 10, 1995.

and Mr. Wright clearly explained the report to the Court. Upon cross examination, counsel asked Mr. Wright to read paragraph six, on page 74. This paragraph explained the results of a certain procedure used during the course of the investigation. The results were particularly damaging to Mr. Smith. Shortly after, opposing counsel presented Mr. Wright with a second report. Mr. Wright recognized the report as one of the drafts prepared by his firm. Opposing counsel asked Mr. Wright to turn to page 74 and read the same paragraph. Mr. Wright informed the Court that he could not read the text, as the paragraph simply was not there.

After a series of questions, Mr. Wright admitted that he did not know why the paragraph was not included in the earlier draft, and did not know if this text was added by someone else who had reviewed the report. Since Firm W disposed of all their earlier drafts, Mr. Wright did not have the opportunity to review them, and lost valuable credibility in the eyes of the Court. It appeared as if Mr. Wright was not aware of what had been submitted in the report. Luckily for Mr. Wright, when he returned to the stand the next day, he was able to explain to the Court that the information that led to the inclusion of that particular paragraph was received after the draft was written and was added during the review stage of the report. This additional paragraph had been documented in the file.

In this hypothetical scenario, the consequences of the draft report surfacing during court were not overly damaging unlike in the introduction, simply because it is a hypothetical scenario. The implications can be much more devastating in a real courtroom as

demonstrated in Gomery's comments sighted earlier. Discrepancies between draft reports and final reports that cannot be explained or accounted for one reason or another that make their appearance in Court are every IFA's nightmare. Unexplained differences or changes can adversely affect the credibility of the expert and renders the final report useless. This is often the reason why draft reports are disposed of immediately after the final report has been submitted. In this case, the government institution had a copy of the draft report, and the opposing expert was able to access the draft reports through the *Access to Information Act*. In this particular case, it may have been best for Firm W to have retained the draft reports, so that Mr. Wright could have reviewed and compared the versions for differences before his testimony.

Communication

This is the final hypothetical scenario to be examined in this report. Unfortunately, other than the observations made from practicing IFAs, no evidence was found to support this scenario. However, using wireless communications to communicate while avoiding e-mail servers appears to be a real problem which will garner more and more attention as technology tools continue to be developed.

Hypothetical Scenario – Part III – Wireless Communication

After Mr. Smith was convicted, there was a short debriefing session between the client, counsel and Firm W. During this session, the trial was reviewed by all parties, analyzing the areas that could be improved in the future. Firm W brought up the fact that their draft reports were released to opposing counsel, and were not subject to the solicitor–client exemption. Despite the disclaimers included in the drafts and the final report stating that distribution to third parties was subject to the approval of Firm W, the government institution still released the drafts. After reviewing the term control, it was decided that Firm W would no longer allow staff to send portable document files (or the more commonly known PDF documents), e-mails or any other electronic transmission of draft reports to each other and the clients as it leads to less documentation in the actual files.

In an attempt to limit the amount of records that are subject to the Act, individuals have been known to use personal digital assistants (or PDAs), such as Blackberries or Palm Treos to communicate, over the internet, with one another. The argument for using these electronic tools being that what the government does not control cannot be subject to the

Access to Information Act. Since these PDAs are not connected to government servers, they not only allow for efficient communications, but are not subject to the Act. The potential problem with this type of communication, however, is that it leads to less accurate and up-to-date documentation within the files.

These hypothetical scenarios demonstrate some of the problems that IFAs are faced with today. Unfortunately, there are very few cases dealing with forensic accountants and the Act, but the risks remain real. The fact that the Office of the Information Commissioner would not provide an opinion or comment on these scenarios is disconcerting. According to the Office, they were not in a position to provide an opinion, as that is the role of the Court. Those cases that are worth looking at have been outlined below.

Cases Under the Act

After reviewing cases involving the *Access to Information Act* and Forensic Accountants on the website of Office of the Commissioner for Federal Judicial Affairs,[22] only two relevant cases came up. The 1990 to 2005 Annual Reports from the Information Commissioner of Canada were also reviewed for relevant cases, but none were found. A review of the cases under the various relevant sections in the *Federal Access to Information and Privacy Legislation Annotated 2006* book confirms that there are very few cases with respect to accountants in general.

[22] Office of the Commissioner for Federal Judicial Affairs, http://reports.fja.gc.ca/fc/rep/10000_pub.html.

PricewaterhouseCoopers, LLP versus the Minister of Canadian Heritage.[23]

In 1998, the Ministry of Canadian Heritage contracted the applicant, PricewaterhouseCoopers LLP (PWC) for the purpose of reviewing, analyzing and recommending changes to its documents being used to outsource elements of its work. In preparing the two reports, PWC claimed that the firm had used a proprietary tool in its methodology, which the firm had developed over a period of time. Disclosure of the two reports to the public would damage PWC's competitive advantage. Thus, PWC brought an application under Section 44 with respect to Sections 20(1)(a), (b), and (c) of the Act.

PWC claimed that, through their reports, competitors could improve or modify their methodology based on PWC's approach. Within the reports as examined by the Court, it was clear that the information was technical in nature, and that it was provided to the Ministry on that basis.

This case further substantiates the fact that the term 'trade secret' is not properly defined under the Act. The presiding judge, Campbell J., referred to the case of *Société Gamma Inc.*[24] In that case, Strayer J. defines a trade secret as, "Something, probably of a technical nature, which is guarded very closely and is of such particular value to the owner of the trade secret that harm to him would be presumed by its mere disclosure."

[23] *PricewaterhouseCoopers, LLP v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No 1439 (QL) (F.C.T.D.).
[24] *Société Gamma Inc. v. Canada (Department of Secretary of State)*, [1994], 56 C.P.R. (3d) 58 F.C.T.D), p.62.

This definition is actually very similar to the one used in the *Descôteaux* case. Examples of particularly guarded trade secrets would include the formula for Coca Cola, or the programming code for Microsoft's Windows operating system.

In this case, Campbell J. held that the reports did contain the methodology and that the methodology was a trade secret. Campbell J. deemed that following the exemptions, the methodology was technical in nature, was guarded very closely and was unique enough that disclosure of such methodology could be presumed to cause economic harm to PWC.

It was also determined that the reports contained technical information. Therefore, the report would qualify as commercial information that lead to confidential information being provided to the Ministry [Section 20(1)(b)]. Campbell J. also determined that a reasonable expectation of probable harm was present [Section 20(1)(c)].

The Federal Court Trial Division ruled in favour of PWC. The Federal Court of Appeal later dismissed the Minister of Canadian Heritage's appeal and the Ministry was not allowed to disclose the two reports.

This is an important case with respect to final reports and their content. Since the methodology was considered a trade secret, and in this case was a significant part of the report, the reports were withheld from disclosure.

The Professional Institute of the Public Service of Canada versus Canada (Director of the Canadian Museum of Nature)[25]

The next case deals with solicitor–client privilege and it is an important case to note as it offers some insight as to the control IFAs have once a report has been submitted to a government institution.

In this case, the Professional Institute of the Public Service of Canada (PIPSC) union was denied access to a forensic accounting report prepared by the forensic accountants to recommend to the Museum's solicitor whether a defamation action against the union was prudent or not. In 1994, the Canadian Museum of Nature laid-off seven employees. The PIPSC's union reviewed the circumstances around the lay-offs and published a report criticizing the Museum's management and handling of funds. The Museum then hired an accounting firm, then known as Peat Marwick and Thorne (PMT), to conduct a forensic audit to review the allegations. The purpose of the forensic audit would serve to justify or disqualify the allegations made by the union, but also serve as a way of determining whether it was prudent for the Museum to proceed with litigation against the union.

A letter from PMT to the Museum's solicitor confirmed that the report would be prepared in order to support a potential defamation action against the union. Later that year, the report concluded that the Museum's management had done no wrongdoing and that the report would not be released to the PIPSC based on solicitor–client privilege. At the same time, a representative of the Office of the Auditor General (AG) expressed concerns

[25] *The Professional Institute of the Public Service of Canada v. Canada (Director of the Canadian Museum of Nature)*, [1995] 3 F.C. 643.

that the Office needed to be prepared to answer any questions surrounding this case and should review the report in order to further that goal.

The AG's Office reviewed the report and the report was referred to in the Auditor General's financial audit of that year. The PIPSC requested disclosure of the forensic report, claiming that the solicitor–client privilege was waived by voluntarily disclosing the report to the Auditor General.

Since the report was prepared for the purpose of potential or actual litigation, the report was deemed to be exempt from disclosure under the solicitor–client privilege section. The second argument the PIPSC used, however, was more compelling.

In order to form his decision, Noël J. referred to the *Cineplex Odeon Corp. versus Minister of National Revenue* case.[26] In this case, presiding judge Harley J. stated;

> *It appears from the practice in the United States outlined in an article "Lawyers' Responses to Audit Inquiries and the Attorney–Client Privilege," Arthur B. Hooker; in (1980), Bus. Law. 1021, that auditors will often request, privileged documents from clients or their attorneys in the course of the audit. To the extent that these disclosures are necessary to permit the independent auditor to fulfil his obligations the client will be required to waive the privilege.*

[26] *Cineplex Odeon Corp v. Canada (Minister of National Revenue)*, [1994], 114 D.L.R. (4th) 141 (Ontario General Division).

Noël J. further determined that the relationship between the Auditor General and the Museum is one of external auditor and client. Thus, the Auditor General must be viewed as a third party with respect to the government entities. Despite the Museum's arguments that they were compelled to disclose the report to the Auditor General, Noël J. determined that the report was turned over to the Auditor General voluntarily and with the knowledge that the report would be reviewed and used in conformity with the Auditor General's statutory mandate. [27]

There was further evidence showing that the Museum's Audit and Finance Committee had been specifically advised that the audit would extend beyond the norms of auditing and that the Auditor General had the duty to report to the federal government.

In conclusion, Noël J. determined that the Museum waived its solicitor–client privilege when the report was turned over to the Auditor General and an order compelling the Museum to release the report to the PIPSC was issued.[28]

This case is significant because it builds on the case that was presented in 'Hypothetical scenario – Part II – Report.' This case implies that, even though the *Access to Information Act* does not mention that the report "was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation

[27] *The Professional Institute of the Public Service of Canada v. Canada (Director of the Canadian Museum of Nature)*, [1995] 3 F.C. 643.
[28] Ibid.

of or for use in litigation,"[29] Noël J. determined that the report was still exempt under Section 23 of the Act. In this case, it appears that the federal act draws from the municipal act for clarification and interpretation.

The fact that the Museum waived its solicitor–client privilege by submitting the report to the Auditor General establishes the significance of the second important issue regarding control of the report and the challenges forensic accounting firms face each time they hand over a report. In spite of the confidentiality and distribution of the documentation, once PMT submitted the report to the Museum, the firm lost control over the distribution of the documentation.

Actions to Safeguard Documentation

Like most third parties, IFAs would rather not have the information they produce and provide for the government subject to disclosure. Unfortunately, it is not easy to block disclosure of information requested under the Act. As the hypothetical scenarios and the cases demonstrated, the Act is very broad, and often poorly defined, leaving much room for interpretation. Disclosure of information is mostly left to the interpretation of the individual reviewing the request. In this section of the paper, various suggestions for safeguarding or limiting the access of documentation will be introduced.

IFAs must continuously strive to meet the demanding requirements of Section 20 of the *Access to Information Act*. The first place to start is within the office, before the first

[29] *Municipal Freedom of Information and Protection of Privacy Act*, (R.S.O. 1990), Exemptions, Section 12, Solicitor-client privilege.

RFP goes out. By instituting an information management strategy to treat certain information as confidential, the first step to reducing the chance of a record being considered as non-confidential has been taken.

In order to implement such a strategy, IFAs must first determine what can truly be considered confidential. All documents that must remain confidential should be marked as such with a confidentially clause. Caution must be demonstrated here as the standard confidentiality clause will not be sufficient on its own to establish confidentiality. Also, overuse of such a clause may discredit its claim. In other words, if a document has a standard confidentiality clause, which has been agreed to by both parties and the document does not qualify under an exemption clause under the Act, a court could still grant a third-party access to the document.

For a confidentiality clause to be effective under the Act, the clause must first start with a standard statement. In addition to the confidentiality clause, a statement asserting that the provider of the information would like to be able to make representation in the event that a request for access is made should be included. Where trade secret information is contained within the document (keeping in mind that the definition of a trade secret is very narrow), a statement concerning the inclusion of trade secret information should also be added. As stated earlier when examining the definition and interpretation of trade secret, it is the only subsection under Section 20 that is not subject to the public interest disclosure override, and no proof of harm must be demonstrated. Taking into consideration all of these points, a suitable confidentiality statement may look like this:

> *The information contained herein is confidential commercial information and is supplied on that basis. We believe that the information contains trade secrets and that the disclosure could reasonably be expected to cause material financial loss to us. In the event that you intend to disclose all or any part of the information, we should be advised at [address] to the attention of [name of person responsible for the information], so that we can make appropriate detailed representation to you about the nature of the information.*[30]

Although this statement may be more directed for disclosure with respect to the Act, the possibility of a court granting access may still exist. It is not sufficient to simply insert a statement providing the terms and conditions will not suffice. In order to validate the statement, actions with respect to the information considered confidential must be taken. For example, the information must be known to a small, select group of individuals. Also, the information should be rarely disclosed, which implies that access to the information within the office should be limited to designated personnel. For example, in the case of PWC, it was determined that the methodology was a trade secret, but to ensure that the information remain confidential, there must be more rational behind the confidentiality than a mere knowledge of knowing how to efficiently manipulate data due to experience.

[30] McIsaac, Barbara A., Managing Partner McCarthy Tetrault LLP. *The Business of Public Sector Procurement*. "Access to your information," ProQuest Information and Learning Company, Ottawa, Ontario, April 2004.

Limiting access to the government institution is also an option for safeguarding the documentation. What the government does not have, it can not disclose. Limiting access to the government organization can be accomplished by reviewing drafts with the client, at the IFA's office, after which the IFA can destroy. If the location is secure and all the drafts are collected at the end of the meeting, ensuring no copies leave the office, this greatly reduces the number of drafts currently in circulation. As for electronic versions, there are software available that will limit what a recipient can do with the information once he or she receives it, such as denying readers the ability to edit, print or forward the document to a third party. Although the technology reduces the activity permitted with regards to the draft report, using software on its own is not a solution. The risk remains that the information is still under control of the government institution, as it is still available on that specific computer.

Some articles suggest that a request should be made to the government institution for the destruction or return of the documents.[31] Although this suggestion is theoretically sound, it is nevertheless unlikely that the government institution will dispose of all the documents and all the copies in a manner which would limit its ability to grant access under the Act. As mentioned earlier, and is often the case, one version of the document may be found in a computer recycle box, on an e-mail server, or even archived

[31] McIsaac, Barbara A., Managing Partner McCarthy Tetrault LLP. *The Business of Public Sector Procurement*. "Access to your information," ProQuest Information and Learning Company, Ottawa, Ontario, April 2004.

Daniel, Gary. *Access to Information Managing Intellectual Property*. "Access to information," UMI, Inc; ABI/INFORM, Toronto, Ontario, April 1994.

somewhere on backup tapes or servers. Reliance on the government to dispose of the information simply does not appear to be a viable option for IFAs.

IFAs should also plan their documents in a manner that will facilitate disclosure in the event that the entire document does not qualify under one of the exemptions. For example, trade secrets such as methodology and procedures, as well as any confidential financial, commercial or technical information should be in schedules attached to the main document. By doing so, it becomes easier to separate the information that can be disclosed and the information that cannot. It also makes the representation more reasonable. The Courts have shown their reluctance in accepting that an entire document should be exempt from disclosure.[32] By separating the information, a certain organization and consciousness of the Act is demonstrated and becomes more reasonable to the Court. By separating the information, it becomes easier to identify the pages that contain confidential information and to ensure that each page containing confidential information is marked as such.

These suggestions are by no means a way of ensuring non-disclosure. As mentioned, the Act is open to interpretation and with each case being different, both from an information-content standpoint and the individual making the decision to disclose the information or not, there is still a risk that these suggestions will not suffice.

[32] Daniel, Gary. *Access to Information Managing Intellectual Property*. "Access to information," UMI, Inc; ABI/INFORM, Toronto, Ontario, April 1994.

It goes without saying that, in the event that a request for information concerning an IFA's work is filed, the IFA should be prepared to respond. In instances where a firm provides information to the government on a regular basis, one should consider the option of assigning one individual within the firm to review for confidentiality all outgoing correspondence with government institutions. By having one contact within a firm, that individual will be in a better position to either deal with the response, or forward the documentation to the appropriate partner or even legal counsel in a more efficient fashion. The individual filing a submission to block disclosure of information should be someone who appreciates some of the narrow definitions within the Act, and its broad interpretation potential.

Current Reforms and the Future of the Act

In the "A brief history of the Act" section, it was mentioned that the Minister of Justice had introduced a discussion paper and that the Information Commissioner, Mr. John H. Reid, had produced a draft bill for the Act. In this section, the paper will review the propositions from the Minister of Justice and the recommendations within the draft bill from the Information Commissioner.

The following are a few propositions from the Minister of Justice from his discussion paper, *A Comprehensive Framework for Access to Information Reform*, presented in April 2005:

1 Coverage under the Act should be extended to the House of Commons, the Senate and the Library of Parliament. However, the Act should exclude information protected by parliamentary privilege, political parties' records, and the personal, political and constituency records of the individual Senators and Members of Parliament.

2 The Minister of Justice invited the House of Commons Standing Committee on Access to Information to review how parliamentary institutions and Members, as well as Officers and Agents of Parliament, should be subject to the Act and what special protections they would need if they were covered.

3 Crown corporations comments were made as follows:

- Ten parent Crown corporations could be included to the Act without legislative reforms.[33]
- For six other Crown corporations, exemptions under the current Act were not sufficient to protect their commercial or other interests. The corporations could be added to Schedule I, but additional protection would be required.[34]
- The Canadian Broadcasting Corporation should be excluded to protect its journalistic integrity and the Canada Pension Plan Investment Board should be excluded because of its federal/provincial nature.

4 Section 24 should be retained but recommended that the number of provisions in Schedule II[35] be reduced and that criteria be established to determine the provisions that should be listed in the future.

[33] See Appendix D.
[34] Ibid.
[35] Schedule II relates to Section 24 of the Act, Statutory Prohibition. Under this section, "the head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II." Schedule II of the Act can be found in Appendix B.

The following are some highlights of the reforms proposed by the Mr. Reid as outlined in his speech on October 6, 2005:

1 All exemptions should contain an injury test and be discretionary. All well, all exceptions should be subject to a public interest override.

2 Public officials should be required to document their decisions, actions, considerations and deliberations.

3 The last vestiges of unreviewable government secrecy (i.e. cabinet confidences) should be brought within the coverage of the law and the review jurisdiction of the Commissioner.

4 The coverage of the access law must be made comprehensive to all the mechanisms of government through which public funds are spent or public funds are discharged. The reference here is to all Crown corporations, foundations, Agents of Parliament, as well as the Ministers' offices and the Prime Minister's Office.

5 Section 24 of the *Access to Information Act* should be abolished.

6 Other important changes such be established:

- Setting out the roles and responsibilities of Access co-ordinators.
- Establishing incentives for respecting response deadlines.
- Expanding the mandate of the Information Commissioner.

The propositions and reforms outlined above clearly demonstrate the differences in the point of views of these two parties. The Minister of Justice made no mention of adding

the injury test and its discrete application to exemptions, or of introducing the public-interest override to all exceptions in his recommendations. The Information Commissioner did however propose that the injury test and public-interest override be applied to *all* the exemptions, which would also include the trade secrets exemption. By recommending that the government officials should be required to document everything, Mr. Reid declares his discontent with the transparency of government officials by recommending. He also recommends that cabinet confidences be subject to the Act. The Justice Minister was somewhat less critical of the Act and his proposed reforms still allowed for some level of secrecy.

With regards to the controversial Section 24 of the Act, the Information Commissioner would like to abolish it all together, whereas the Justice Minister recommends that it remain, but undergo some changes, most noticeably the shortening of Schedule II. It should also be pointed out that, in his Phase II report, Justice Gomery agreed with a number of the reforms proposed by the Information Commissioner.[36]

As a result of the Minister of Justice propositions and recommendations to further study the issue, and the Information Commissioner's proposal to amend the Act, a document entitled *Strengthening the Access to Information Act*[37] was issued by the Government of Canada. On April 11, 2006, the proposed *Federal Accountability Act* was introduced. In essence, this act includes numerous reforms to the *Access to Information Act*, mostly

[36] Gomery, Honourable John H. Restoring Accountability Phase 2 Report. *Commission of Inquiry into the Sponsorship Program & Advertising Activities: Restoring Accountability Recommendations.* "Transparency and Better Management," Recommendation 16, pages 181 to 185.
[37] Government of Canada. Discussion paper. "Strengthening the Access to Information Access, 2005. (http://canada.justice.gc.ca/en/dept/pub/atia/atia_e.pdf).

those proposed by the Minister of Justice, featuring key issues that should require further consulting.

The following are a few highlights from the *Federal Accountability Act*:

- Coverage of the *Access to Information Act* will be extended to seven parent Crown corporations, Agents of Parliament, and three foundations with federal statutes.
- Ten additional exceptions will be added to ensure that adequate protection of sensitive information of the new entities will be covered.
- A number of proposed access reforms, which are fairly complex, will be subject to further analysis, discussion and debates. Delayed reforms include coverage of other entities, Cabinet confidences, duty to document and the exemption scheme.

It is not surprising that on April 28, 2006, just two weeks after the introduction of the *Federal Accountability Act*, the National Post published a story[38] covering Mr. Reid's outrage with the Act, stating:

> *No previous government, since the* Access to Information Act *came into force in 1983, has put forward a more retrograde and dangerous set of proposals.…The Bill would make it easier for the government to cover up wrongdoing.…It also would make it easier for the government to shield itself from embarrassment and control the flow of information to Canadians.*

[38] Gordon, James, *Canada.com*, "Information czar blasts Harper's accountability bill," CanWest News Service, April, 29, 2006.

Of the 10 new exemptions, eight of them contain no requirement for bureaucrats to demonstrate why the records should not be disclosed and they contain no public-interest override. Under the Act presented earlier, only one exemption was not subject to public-interest override: the trade secret exemption. Mr. Reid points out that in the current Act, there was only one exemption that did not require a reason as to why a record should not be disclosed, and "it has been consistently abused."[39]

The new exemption that has the greatest impact for auditors and forensic accountants, however, states that internal reports and audits would be shielded from scrutiny for 15 years and records relating to investigations of wrongdoing in government would be sealed forever.[40]

This exemption is a significant one. Recall what happened with the partner at the Sponsorship Commission and the hypothetical report scenario. With this exemption, and some creative tailoring to the engagement structure, accountants and forensic accountants could ensure that draft reports or final reports are never disclosed to the public again.

[39] Gordon, James, *Canada.com*, "Information czar blasts Harper's accountability bill," CanWest News Service, April, 29, 2006
[40] Government of Canada. Discussion paper. "Strengthening the Access to Information Access, 2005.

Conclusion – Learning from History

The responsibility of the Act is to provide access to information to Canadians and, as such, it is the responsibility of third parties to protect the information they provide to the government institutions. The comments below are not only addressed to forensic accountants, but to all accountants, who provide services to these government institutions.

Knowing the Statutes

A great deal of the research for this paper was spent in reviewing the history and the provisions of the *Access to Information Act*. This was done to demonstrate the constant evolution of the Act and the necessary awareness of the impacts legislative reforms can have on the Act. As it was demonstrated in the scenarios, various documents, reports and communications can be requested through the Act. To help protect the information from being disclosed, one must first have a proper understanding of the purpose of the Act—and in order to properly understand this purpose, the spirit of the Act must also be understood. Once an individual has a proper appreciation of the Act, it becomes possible for that person to develop a proper plan to prevent disclosure, and when necessary, to defend the information from disclosure.

As demonstrated earlier in this paper, there are various versions of the *Access to Information Act*. This paper presented in great detail the federal Act, but it is important to know that each province and numerous municipalities have their own version of the

Act, some of which feature slight nuances that may affect the way an engagement should be conducted.

Preventive and Re-active Measures

When dealing with a government institution, it is essential for the IFA to remember to treat confidentiality very seriously. Prevention of disclosure begins before the first response to a RFP is submitted. It is imperative that IFAs follow these steps:

- Be aware of the act that governs the engagement. At each level of government, there will be a different act, which may differ from the federal act.
- Have a defined plan, with policies that spell out how confidential information is to be treated within the firm.
- Have a discussion with the client early on in the process (at the RFP level if possible) about the Access to Information Act. Concerns about disclosure should be voiced and the risk should be evaluated. If the risk is too great, do not proceed with the RFP.
- When methodologies and procedures provide a significant advantage over competitors, ensure that these methodologies and procedures are not widely published.
- Protect confidentiality by limiting the number of individuals privy to the information, both within the firm, and moreover, within the government.

- Limit the amount of documentation provided to the government institution, in all formats. With the advancement of technology, information is available in multiple forms and travels very quickly.
- Ensure that not all the documents are marked as confidential—only those that truly contain sensitive material. A generalization of confidential information diminishes the validity of the claim. The Courts are more and more aware of this and have become very good at distinguishing genuinely sensitive information.
- For the information that is truly confidential, separate it from the rest of the information. By separating documents, it becomes easier to withhold entire sections from disclosure.
- Design the confidentiality clause in accordance to the audience. For example, if the information could be potentially subjected to the Act, ensure that the confidentiality clause addresses the Act.
- Mark each page of information that is confidential with the term 'confidential' and make reference to the specific clause.
- When possible, take advantage of the solicitor–client privilege clause by either having all communications directed to legal counsel, or documenting early on in the engagement process the purpose of the engagement, specifying potential litigation support if possible.
- In firms where the number of government engagements is considerable, consider having a contact person. This person's responsibility will be to properly deal with requests for disclosure.

- Have the client review as much information as possible in a controlled environment, such at the IFA's office. This limits the control of the documentation to the IFA and a proper destruction of the information can be completed after review.
- Consider the possibility of legal advice if necessary.

Investigative forensic accountants must also be aware that once the engagement is completed, whatever information has been provided to the government institution becomes virtually impossible to control. In the event that a request for access to information is received, it is crucial to properly address such requests in a timely fashion. Time is of the essence in many such cases. Using the plan put in place in the pro-active phase, an IFA should start assembling the arguments and evidence that will support why the information should not be disclosed.

These measures of prevention, used individually or collectively, do not guarantee that access to information will be denied. These measures will however provide the proper tools to object to the request and make proper representation in front of the Court, as well as perhaps delaying the access long enough that by the time it is granted, the information sought is no longer relevant.

Currently, under the new *Federal Accountability Act*, draft and final internal auditor reports are exempt from disclosure. Since this exemption is only a few months old, it is difficult to assess how it will be used and whether it will adversely affect IFAs or not. It

is possible that perhaps IFAs will be contracted to investigate and assemble the findings, which will then be turned over to internal auditors who, in turn, will use this documentation within their own working paper files to prepare their own draft and final reports.

The scenarios presented in this paper are examples of issues serious enough to cause concern in the area of investigative forensic accounting, and with good reason. The partner in the Gomery Inquiry was the victim of one of these issues, and that partner's reputation as a professional suffered as a result of it.

In an environment where access to information is the rule, and confidentiality is the exception, the only thing one can do is be informed and prepared.

Appendices

Appendix A – Schedule I of the *Access to Information Act*

Government Institutions

Departments and Ministries of State

Department of Agriculture and Agri-Food
Ministère de l'Agriculture et de l'Agroalimentaire

Department of Canadian Heritage
Ministère du Patrimoine canadien

Department of Citizenship and Immigration
Ministère de la Citoyenneté et de l'Immigration

Department of the Environment
Ministère de l'Environnement

Department of Finance
Ministère des Finances

Department of Fisheries and Oceans
Ministère des Pêches et des Océans

Department of Foreign Affairs and International Trade
Ministère des Affaires étrangères et du Commerce international

Department of Health
Ministère de la Santé

Department of Human Resources and Skills Development
Ministère des Ressources humaines et du Développement des compétences

Department of Indian Affairs and Northern Development
Ministère des Affaires indiennes et du Nord canadien

Department of Industry
Ministère de l'Industrie

Department of Justice
Ministère de la Justice

Department of National Defence
Ministère de la Défense nationale

Department of Natural Resources
Ministère des Ressources naturelles

Department of Public Safety and Emergency Preparedness
Ministère de la Sécurité publique et de la Protection civile

Department of Public Works and Government Services
Ministère des Travaux publics et des Services gouvernementaux

Department of Transport
Ministère des Transports

Department of Veterans Affairs
Ministère des Anciens Combattants

Department of Western Economic Diversification
Ministère de la Diversification de l'économie de l'Ouest canadien

Other Government Institutions

Assisted Human Reproduction Agency of Canada
Agence canadienne de contrôle de la procréation assistée

Atlantic Canada Opportunities Agency
Agence de promotion économique du Canada atlantique

Atlantic Pilotage Authority
Administration de pilotage de l'Atlantique

Bank of Canada
Banque du Canada

Belledune Port Authority
Administration portuaire de Belledune

Blue Water Bridge Authority
Administration du pont Blue Water

British Columbia Treaty Commission
Commission des traités de la Colombie-Britannique

Business Development Bank of Canada
Banque de développement du Canada

Canada Border Services Agency
Agence des services frontaliers du Canada

Canada Council for the Arts
Conseil des Arts du Canada

Canada Deposit Insurance Corporation
Société d'assurance-dépôts du Canada

Canada Development Investment Corporation
Corporation de développement des investissements du Canada

Canada Emission Reduction Incentives Agency
Agence canadienne pour l'incitation à la réduction des émissions

Canada Employment Insurance Commission
Commission de l'assurance-emploi du Canada

Canada Industrial Relations Board
Conseil canadien des relations industrielles

Canada Lands Company Limited
Société immobilière du Canada limitée

Canada Mortgage and Housing Corporation
Société canadienne d'hypothèques et de logement

Canada-Newfoundland Offshore Petroleum Board
Office Canada — Terre-Neuve des hydrocarbures extracôtiers

Canada-Nova Scotia Offshore Petroleum Board
Office Canada — Nouvelle-Écosse des hydrocarbures extracôtiers

Canada Revenue Agency
Agence du revenu du Canada

Canada School of Public Service
École de la fonction publique du Canada

Canadian Advisory Council on the Status of Women
Conseil consultatif canadien de la situation de la femme

Canadian Air Transport Security Authority
Administration canadienne de la sûreté du transport aérien

Canadian Artists and Producers Professional Relations Tribunal
Tribunal canadien des relations professionnelles artistes-producteurs

Canadian Centre for Occupational Health and Safety
Centre canadien d'hygiène et de sécurité au travail

Canadian Commercial Corporation
Corporation commerciale canadienne

Canadian Cultural Property Export Review Board
Commission canadienne d'examen des exportations de biens culturels

Canadian Dairy Commission
Commission canadienne du lait

Canadian Environmental Assessment Agency
Agence canadienne d'évaluation environnementale

Canadian Firearms Centre
Centre canadien des armes à feu

Canadian Food Inspection Agency
Agence canadienne d'inspection des aliments

Canadian Forces
Forces canadiennes

Canadian Forces Grievance Board
Comité des griefs des Forces canadiennes

Canadian Government Specifications Board
Office des normes du gouvernement canadien

Canadian Grain Commission
Commission canadienne des grains

Canadian Human Rights Commission
Commission canadienne des droits de la personne

Canadian Human Rights Tribunal
Tribunal canadien des droits de la personne

Canadian Institutes of Health Research
Instituts de recherche en santé du Canada

Canadian International Development Agency
Agence canadienne de développement international

Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Canadian Museum of Civilization
Musée canadien des civilisations

Canadian Museum of Nature
Musée canadien de la nature

Canadian Nuclear Safety Commission
Commission canadienne de sûreté nucléaire

Canadian Polar Commission
Commission canadienne des affaires polaires

Canadian Race Relations Foundation
Fondation canadienne des relations raciales

Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Canadian Security Intelligence Service
Service canadien du renseignement de sécurité

Canadian Space Agency
Agence spatiale canadienne

Canadian Tourism Commission
Commission canadienne du tourisme

Canadian Transportation Accident Investigation and Safety Board
Bureau canadien d'enquête sur les accidents de transport et de la sécurité des transports

Canadian Transportation Agency
Office des transports du Canada

Cape Breton Development Corporation
Société de développement du Cap-Breton

Cape Breton Growth Fund Corporation Corporation

Fonds d'investissement du Cap-Breton

Copyright Board
Commission du droit d'auteur

Correctional Service of Canada
Service correctionnel du Canada

Defence Construction (1951) Limited
Construction de défense (1951) Limitée

Director of Soldier Settlement
Directeur de l'établissement de soldats

The Director, The Veterans' Land Act
Directeur des terres destinées aux anciens combattants

Economic Development Agency of Canada for the Regions of Quebec
Agence de développement économique du Canada pour les régions du Québec

Energy Supplies Allocation Board
Office de répartition des approvisionnements d'énergie

Enterprise Cape Breton Corporation
Société d'expansion du Cap-Breton

Farm Credit Canada
Financement agricole Canada

The Federal Bridge Corporation Limited
La Société des ponts fédéraux Limitée

Federal-Provincial Relations Office
Secrétariat des relations fédérales-provinciales

Financial Consumer Agency of Canada
Agence de la consommation en matière financière du Canada

Financial Transactions and Reports Analysis Centre of Canada
Centre d'analyse des opérations et déclarations financières du Canada

Fraser River Port Authority
Administration portuaire du fleuve Fraser

Freshwater Fish Marketing Corporation
Office de commercialisation du poisson d'eau douce

Grain Transportation Agency Administrator
Administrateur de l'Office du transport du grain

Great Lakes Pilotage Authority
Administration de pilotage des Grands Lacs

Gwich'in Land and Water Board
Office gwich'in des terres et des eaux

Gwich'in Land Use Planning Board

Office gwich'in d'aménagement territorial

Halifax Port Authority
Administration portuaire de Halifax

Hamilton Port Authority
Administration portuaire de Hamilton

Hazardous Materials Information Review Commission
Conseil de contrôle des renseignements relatifs aux matières dangereuses

Historic Sites and Monuments Board of Canada
Commission des lieux et monuments historiques du Canada

Immigration and Refugee Board
Commission de l'immigration et du statut de réfugié

International Centre for Human Rights and Democratic Development
Centre international des droits de la personne et du développement démocratique

International Development Research Centre
Centre de recherches pour le développement international

The Jacques-Cartier and Champlain Bridges Inc.
Les Ponts Jacques-Cartier et Champlain Inc.

Laurentian Pilotage Authority
Administration de pilotage des Laurentides

Law Commission of Canada
Commission du droit du Canada

Library and Archives of Canada
Bibliothèque et Archives du Canada

Mackenzie Valley Environmental Impact Review Board
Office d'examen des répercussions environnementales de la vallée du Mackenzie

Mackenzie Valley Land and Water Board
Office des terres et des eaux de la vallée du Mackenzie

Marine Atlantic Inc.
Marine Atlantique S.C.C.

Merchant Seamen Compensation Board
Commission d'indemnisation des marins marchands

Military Police Complaints Commission
Commission d'examen des plaintes concernant la police militaire

Montreal Port Authority
Administration portuaire de Montréal

Nanaimo Port Authority
Administration portuaire de Nanaïmo

The National Battlefields Commission

Commission des champs de bataille nationaux

National Capital Commission
Commission de la capitale nationale

National Energy Board
Office national de l'énergie

National Farm Products Council
Conseil national des produits agricoles

National Film Board
Office national du film

National Gallery of Canada
Musée des beaux-arts du Canada

National Museum of Science and Technology
Musée national des sciences et de la technologie

National Parole Board
Commission nationale des libérations conditionnelles

National Research Council of Canada
Conseil national de recherches du Canada

National Round Table on the Environment and the Economy
Table ronde nationale sur l'environnement et l'économie

Natural Sciences and Engineering Research Council
Conseil de recherches en sciences naturelles et en génie

Northern Pipeline Agency
Administration du pipe-line du Nord

North Fraser Port Authority
Administration portuaire du North-Fraser

Northwest Territories Water Board
Office des eaux des Territoires du Nord-Ouest

Nunavut Surface Rights Tribunal
Tribunal des droits de surface du Nunavut

Nunavut Water Board
Office des eaux du Nunavut

Office of Indian Residential Schools Resolution of Canada
Bureau du Canada sur le règlement des questions des pensionnats autochtones

Office of Infrastructure of Canada
Bureau de l'infrastructure du Canada

Office of Privatization and Regulatory Affairs
Bureau de privatisation et des affaires réglementaires

Office of the Comptroller General

Bureau du contrôleur général

Office of the Co-ordinator, Status of Women
Bureau de la coordonnatrice de la situation de la femme

Office of the Correctional Investigator of Canada
Bureau de l'enquêteur correctionnel du Canada

Office of the Inspector General of the Canadian Security Intelligence Service
Bureau de l'Inspecteur général du service canadien du renseignement de sécurité

Office of the Registrar of Lobbyists
Bureau du directeur des lobbyistes

Office of the Superintendent of Financial Institutions
Bureau du surintendant des institutions financières

Old Port of Montreal Corporation Inc.
Société du Vieux-Port de Montréal Inc.

Pacific Pilotage Authority
Administration de pilotage du Pacifique

Parc Downsview Park Inc.
Parc Downsview Park Inc.

Parks Canada Agency
Agence Parcs Canada

Patented Medicine Prices Review Board
Conseil d'examen du prix des médicaments brevetés

Pension Appeals Board
Commission d'appel des pensions

Petroleum Compensation Board
Office des indemnisations pétrolières

Port Alberni Port Authority
Administration portuaire de Port-Alberni

Prairie Farm Rehabilitation Administration
Administration du rétablissement agricole des Prairies

Prince Rupert Port Authority
Administration portuaire de Prince-Rupert

Privy Council Office
Bureau du Conseil privé

Public Health Agency of Canada
Agence de la santé publique du Canada

Public Service Commission
Commission de la fonction publique

Public Service Human Resources Management Agency of Canada

Agence de gestion des ressources humaines de la fonction publique du Canada

Public Service Labour Relations Board
Commission des relations de travail dans la fonction publique

Public Service Staffing Tribunal
Tribunal de la dotation de la fonction publique

Quebec Port Authority
Administration portuaire de Québec

Queens Quay West Land Corporation
Queens Quay West Land Corporation

Regional Development Incentives Board
Conseil des subventions au développement régional

Ridley Terminals Inc.
Ridley Terminals Inc.

Royal Canadian Mint
Monnaie royale canadienne

Royal Canadian Mounted Police
Gendarmerie royale du Canada

Royal Canadian Mounted Police External Review Committee
Comité externe d'examen de la Gendarmerie royale du Canada

Royal Canadian Mounted Police Public Complaints Commission
Commission des plaintes du public contre la Gendarmerie royale du Canada

Saguenay Port Authority
Administration portuaire du Saguenay

Sahtu Land and Water Board
Office des terres et des eaux du Sahtu

Sahtu Land Use Planning Board
Office d'aménagement territorial du Sahtu

Saint John Port Authority
Administration portuaire de Saint-Jean

The Seaway International Bridge Corporation, Ltd.
La Corporation du Pont international de la voie maritime, Ltée

Security Intelligence Review Committee
Comité de surveillance des activités de renseignement de sécurité

Sept-Îles Port Authority
Administration portuaire de Sept-Îles

Social Sciences and Humanities Research Council
Conseil de recherches en sciences humaines

Standards Council of Canada

Conseil canadien des normes

Statistics Canada
Statistique Canada

Statute Revision Commission
Commission de révision des lois

St. John's Port Authority
Administration portuaire de St. John's

Telefilm Canada
Téléfilm Canada

Thunder Bay Port Authority
Administration portuaire de Thunder Bay

Toronto Port Authority
Administration portuaire de Toronto

Treasury Board Secretariat
Secrétariat du Conseil du Trésor

Trois-Rivières Port Authority
Administration portuaire de Trois-Rivières

Vancouver Port Authority
Administration portuaire de Vancouver

Veterans Review and Appeal Board
Tribunal des anciens combattants (révision et appel)

Windsor Port Authority
Administration portuaire de Windsor

Yukon Environmental and Socio-economic Assessment Board
Office d'évaluation environnementale et socioéconomique du Yukon

Yukon Surface Rights Board
Office des droits de surface du Yukon

Appendix B – Schedule II of the Access to Information Act Statutory Prohibition

Act	Provision
Aeronautics Act *Loi sur l'aéronautique*	subsections 4.79 (1) and 6.5 (5)
AntiInflation Act, S.C. 19747576, c. 75 *Loi antiinflation, S.C. 19747576, ch. 75*	section 14
Assisted Human Reproduction Act *Loi sur la procréation assistée*	subsection 18 (2)
Business Development Bank of Canada Act *Loi sur la Banque de développement du Canada*	section 37
CanadaNewfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3 *Loi de mise en œuvre de l'Accord atlantique Canada — Terre-Neuve, S.C. 1987, ch. 3*	section 119
CanadaNova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c. 28 *Loi de mise en œuvre de l'Accord Canada — NouvelleÉcosse sur les hydrocarbures extracôtiers, L.C. 1988, ch. 28*	sections 19 and 122
CanadaNova Scotia Oil and Gas Agreement Act, S.C. 1984, c. 29 *Loi sur l'Accord entre le Canada et la NouvelleÉcosse sur la gestion des ressources pétrolières et gazières, S.C. 1984, ch. 29*	section 53
Canada Pension Plan *Régime de pensions du Canada*	subsection 104.01 (1)
Canada Petroleum Resources Act *Loi fédérale sur les hydrocarbures*	section 101
Canada Transportation Act *Loi sur les transports au Canada*	subsection 51 (1) and section 167
Canadian Environmental Assessment Act *Loi canadienne sur l'évaluation environnementale*	subsection 35 (4)

Act	Provision
Canadian International Trade Tribunal Act *Loi sur le Tribunal canadien du commerce extérieur*	sections 45 and 49
Canadian Ownership and Control Determination Act *Loi sur la détermination de la participation et du contrôle canadiens*	section 17
Canadian Security Intelligence Service Act *Loi sur le Service canadien du renseignement de sécurité*	section 18
Canadian Transportation Accident Investigation and Safety Board Act *Loi sur le Bureau canadien d'enquête sur les accidents de transport et de la sécurité des transports*	subsections 28 (2) and 31 (4)
Competition Act *Loi sur la concurrence*	subsections 29 (1), 29.1 (5) and 29.2 (5)
Corporations and Labour Unions Returns Act *Loi sur les déclarations des personnes morales et des syndicats*	section 18
Criminal Code *Code criminel*	sections 187, 193 and 487.3
Criminal Records Act *Loi sur le casier judiciaire*	subsection 6 (2) and section 9
Customs Act *Loi sur les douanes*	sections 107 and 107.1
Defence Production Act *Loi sur la production de défense*	section 30
Department of Industry Act *Loi sur le ministère de l'Industrie*	subsection 16 (2)
DNA Identification Act *Loi sur l'identification par les empreintes génétiques*	subsection 6 (7)
Energy Administration Act *Loi sur l'administration de l'énergie*	section 98

Act	Provision
Energy Efficiency Act *Loi sur l'efficacité énergétique*	section 23
Energy Monitoring Act *Loi sur la surveillance du secteur énergétique*	section 33
Energy Supplies Emergency Act *Loi d'urgence sur les approvisionnements d'énergie*	section 40.1
Excise Tax Act *Loi sur la taxe d'accise*	section 295
Family Allowances Act *Loi sur les allocations familiales*	section 18
Hazardous Products Act *Loi sur les produits dangereux*	section 12
Canadian Human Rights Act *Loi canadienne sur les droits de la personne*	subsection 47 (3)
Income Tax Act *Loi de l'impôt sur le revenu*	section 241
Industrial Research and Development Incentives Act, R.S.C. 1970, c. I10 *Loi stimulant la recherche et le développement scientifiques, S.R.C. 1970, ch. I10*	section 13
Investment Canada Act *Loi sur Investissement Canada*	section 36
Canada Labour Code *Code canadien du travail*	subsection 144 (3)
Mackenzie Valley Resource Management Act *Loi sur la gestion des ressources de la vallée du Mackenzie*	paragraph 30 (1) (b)
Marine Transportation Security Act *Loi sur la sûreté du transport maritime*	subsection 13 (1)
Motor Vehicle Fuel Consumption Standards Act *Loi sur les normes de consommation de carburant des*	subsection 27 (1)

Act	Provision
véhicules automobiles	
Nuclear Safety and Control Act *Loi sur la sûreté et la réglementation nucléaires*	paragraphs 44 (1) (*d*) and 48 (*b*)
Old Age Security Act *Loi sur la sécurité de la vieillesse*	subsection 33.01 (1)
Patent Act *Loi sur les brevets*	section 10, subsection 20 (7) and sections 87 and 88
Petroleum Incentives Program Act *Loi sur le programme d'encouragement du secteur pétrolier*	section 17
Proceeds of Crime (Money Laundering) and Terrorist Financing Act *Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes*	paragraphs 55 (1) (*a*), (*d*) and (*e*)
Railway Safety Act *Loi sur la sécurité ferroviaire*	subsection 39.2 (1)
Sex Offender Information Registration Act *Loi sur l'enregistrement de renseignements sur les délinquants sexuels*	subsections 9 (3) and 16 (4)
Shipping Conferences Exemption Act, 1987 *Loi dérogatoire de 1987 sur les conférences maritimes*	section 11
Softwood Lumber Products Export Charge Act *Loi sur le droit à l'exportation de produits de bois d'oeuvre*	section 20
Special Import Measures Act *Loi sur les mesures spéciales d'importation*	section 84
Statistics Act *Loi sur la statistique*	section 17
Telecommunications Act *Loi sur les télécommunications*	subsections 39 (2) and 70 (4)
Trademarks Act *Loi sur les marques de commerce*	subsection 50 (6)

Act	Provision
Transportation of Dangerous Goods Act, 1992 *Loi de 1992 sur le transport des marchandises dangereuses*	subsection 24 (4)
Yukon Environmental and Socioeconomic Assessment Act *Loi sur l'évaluation environnementale et socioéconomique au Yukon*	paragraph 121 (*a*)
Yukon Quartz Mining Act *Loi sur l'extraction du quartz dans le Yukon*	subsection 100 (16)

Appendix C – Individuals interviewed*

Dave St-Pierre, Office of the Information Commissioner (did not agree to sign the Consent Form for Research Project Interview)

Eric Murphy, Office of the Information Commissioner (did not agree to sign the Consent Form for Research Project Interview)

Vic Duret, Partner KPMG (mentor)

Greg McEvoy, Associate partner KPMG

Hope Bell, Research and Information – Product and services, Manager KPMG

Paul Loiselle, Former Sûreté du Québec officer, former Senior Manager KPMG

* Additional contact information can be provided upon request.

Appendix D – Proposed additions to Schedule I of the Act

Crown corporations

The 10 parent Crown corporations that could be included to the Act without legislative reforms are:

Canada Development Investment Corporation
Corporation de développement des investissements du Canada

Canadian Race Relations Foundation
Fondation canadienne des relations raciales

Cape Breton Development Corporation
Société de développement du Cap-Breton

Cape Breton Growth Fund Corporation
Corporation Fonds d'investissement du Cap-Breton

Enterprise Cape Breton Corporation
Société d'expansion du Cap-Breton

Marine Atlantic Inc.
Marine Atlantique S.C.C.

Old Port of Montreal Corporation Inc.
Société du Vieux-Port de Montréal Inc.

Parc Downsview Park Inc.
Parc Downsview Park Inc.

Queens Quay West Land Corporation
Queens Quay West Land Corporation

Ridley Terminals Inc.
Ridley Terminals Inc.

These corporations were added to Schedule I on August 31, 2005 – SOR/2005-251

Appendix D – Proposed additions to Schedule I of the Act (continued)

The six other Crown corporations that could be added to Schedule I, but additional protection required are:

Atomic Energy of Canada Ltd.
Énergie atomique du Canada limitée

Canada Post Corporation
Société canadienne des postes

Export Development Canada
Exportation et développement Canada

National Arts Centre Corporation
Corporation du Centre national des Arts

Public Sector Pension Investment Board
Office d'investissement des régimes de pensions du secteur public

VIA Rail Canada Inc.
VIA Rail Canada Inc.

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