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du Canada Information
Commissioner
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The Honourable Serge Joyal, Senator
Chair, Standing Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4

Dear Senator Joyal:

I am writing to you following my appearance before the Standing Senate Committee on Legal and Constitutional Affairs on Wednesday, October 17, 2018. During this appearance, I committed to providing the committee further information on the following topics:

1. Filing of certified orders in Federal Court

I have recommended that Bill C-58 should be amended so that a certified copy of an order of the Information Commissioner can be filed with the Registrar of the Federal Court, making the order an order of the court.

2. *Mandamus* applications

How the Information Commissioner's orders under Bill C-58 could be enforced by a *mandamus* application.

- And relatedly, the last time a *mandamus* application was granted by the Federal Court.

3. Legal Witness

A suggested legal witness who could speak to such proceedings before the Federal Court.

Respect

Excellence

Intégrité Integrity

Leadership

4. Phase two reform and model laws

This is in follow up to a question about what elements of the *Access to Information Act* should be reviewed during the government's mandated second phase review.

Please find information regarding each of these topics below.

Overview of the order power proposed under Bill C-58

Bill C-58 would give the Information Commissioner the power to issue an order against an institution on well-founded complaints.¹

When an institution does not wish to follow the Information Commissioner's order, the scheme proposed under Bill C-58 is that the institutions must apply for a review to the Federal Court.² Institutions have thirty days following receipt of an order to decide if they wish to make an application to the Federal Court.³ An application to the Federal Court stays the operation of the Information Commissioner's order pending the results of the court review.⁴

The review before the Federal Court is *de novo*, which means a full review by the Federal Court of the institution's decision. The Court will make a decision anew, and is not bound by the Information Commissioner's order.

If Federal Court review is not initiated, the Bill states that the Information Commissioner's order "takes effect" the day after the period to seek review expires (i.e. the 31st day after the order is received by the institution).⁵

Filing of a certified copy of the order in Federal Court *versus* applying for a mandamus in Federal Court

To assist the committee in understanding the process I envision under Bill C-58 if my recommendation is implemented versus if it is not implemented, I have attached a flow chart that sets out the two processes.

The following table is a side-by-side comparison of the processes for 1) the filing of a certified order with the Registry of the Federal Court to make it an order of

¹ Orders can be made regarding refusals of access, an unreasonable fee or time extension, and format and language issues. Orders cannot be made for complaints the Information Commissioner initiates, or any other matter a requester may complain about.

² Third parties or the Privacy Commissioner may also seek Federal Court review if they have become a party to the investigation and received a copy of the order.

³ If third parties and/or the Privacy Commissioner are involved, the period to seek review is extended by an additional ten days. During these additional ten days, third parties or the Privacy Commissioner may initiate a review in circumstances where the institution has chosen not to.

⁴ Per s. 41.1.

⁵ Pursuant to new subsection 36.1(4).

the court, enforceable like an order of the court *versus* 2) a *mandamus* Application. Detailed explanations of each process can be found below.

Certified order process vs. Mandamus applications	
Filing of a certified copy of the order making it an order of the Federal Court	<i>Mandamus</i> application
<ul style="list-style-type: none"> • The mere filing of the order at the Registry of the Court makes it an order of the Federal Court that is enforceable like an order of the Federal Court. • Possibility of civil contempt proceedings will likely deter institutions from not complying with an order issued by the Information Commissioner. 	<ul style="list-style-type: none"> • A successful <i>mandamus</i> application must be granted in order for the plaintiff to get an enforceable order from the Federal Court. • Possibility of <i>mandamus</i> may not deter institutions from doing nothing after the Information Commissioner issues an order. This process leaves the burden to enforce the order on the requester or the Information Commissioner who will need to initiate a <i>mandamus</i> application to make the order enforceable.
<ul style="list-style-type: none"> • The filing of a certified copy of an order at the Registry can occur in less than an hour, and involves minimal expenditure of judicial resources to obtain the order.⁶ • If necessary, civil contempt proceedings that would be similar to those envisioned,⁷ generally take around five months – the objective would be to obtain an order requiring the head of the institution to comply with my order. 	<ul style="list-style-type: none"> • <i>Mandamus</i> applications will likely take six to seven months, at the very least. • <i>Mandamus</i> applications would involve the expenditure of a significant amount of judicial resources, along with legal costs, to obtain the order.

⁶ This would involve significantly less legal expenditures by my office to obtain an enforceable order, compared with a *mandamus* application.

⁷ Civil contempt cases involving the Minister of National Revenue are the most similar to the process I am envisioning, as the order of the Court is clear, it is known that the order has been brought to the attention of the head of the institution, and that there has been disobedience the order.

<ul style="list-style-type: none"> • The test to prove civil contempt is not complex: did the head of the institution have actual knowledge of a clear order, and disobey that order? 	<ul style="list-style-type: none"> • The test for <i>mandamus</i> (detailed below) is exacting and complex.
<ul style="list-style-type: none"> • Success rate is high with civil contempt proceedings of the type envisioned. 	<ul style="list-style-type: none"> • Success rate is low with <i>mandamus</i> applications.

Enforcement of the Information Commissioner's orders by filing a certified copy of the order

As I explained before the committee, my concern is for situations when an institution decides not to seek a review before the Federal Court within the thirty day period, but also decides not to comply with an order issued by the Information Commissioner.

To alleviate this concern and recalibrate the balance between requesters and the government, I recommend that a mechanism be added to Bill C-58 so that a certified copy of any order of the Information Commissioner may be filed at the Registry of the Federal Court and made an order of the court that is enforceable like an order of the court. This process would only be available once the time period to seek court review has expired. It would not be available where Federal Court review has been sought. As the Bill already stipulates, the Information Commissioner's orders are not in operation when Federal Court review has been sought.

I do not expect to have to use this mechanism frequently, but if I did, its effect would be that my order would become enforceable as if it were an order of the Federal Court. If an institution did not seek court review and failed to follow the order, I could file the order with the Federal Court and then, if needed, initiate civil contempt proceedings against the head of the institution that is failing to comply with the order (i.e. the minister who is responsible for the institution, the person who is designated the head by order in council, or the chief executive officer of the institution).⁸ The remedy sought will be an order from the court ordering that the head of the institution comply with the order (e.g. do or refrain from doing any act).

Civil contempt proceedings involve a three step process:

- (1) **A show cause order:** I would have to obtain an order from the Federal Court requiring the head of the institution to appear at a scheduled contempt hearing. I would have to establish a *prima facie*, or at first glance, case that contempt has been committed. This step can be done

⁸ The procedures for contempt orders are found at Rules 466-472 of the *Federal Courts Rules*, SOR/98-106.

ex parte (i.e. with only the Information Commissioner as a party) and in writing.

- (2) **A contempt hearing** – I would have to show at a hearing that the head of the institution had actual knowledge of, and disobeyed a clear order that was filed with the Registry of the Federal Court. The standard of proof for is “beyond a reasonable doubt”.⁹
- (3) **Measures** – If the head of the institution is found in contempt, various measures may be ordered by the court. In cases involving non-compliance with my orders, the measure sought would be the issuance of an order of the court requiring the head of an institution to comply with my order.

The measure may be imposed in the same decision as the finding of contempt, or at a separate sentencing hearing.

My office’s review of the case law on civil contempt that is similar to what I envision under Bill C-58, has found that these processes are generally very successful.¹⁰ Since 2005, we found that 21 of the 23 contempt processes were successful. The median timeline was approximately 5 months.

In light of this, it is my view that adding this mechanism to Bill C-58, with corresponding access to contempt proceedings, will deter institutions from simply doing nothing after the Information Commissioner issues an order.

An example of such a mechanism can be found at section 33 of the *Canada Transportation Act*.¹¹ This provision allows orders from the Canadian Transportation Agency to be made an order of the Federal Court, and enforced as orders of the Federal Court.

Enforcement of order

33 (1) A decision or order of the Agency may be made an order of the Federal Court or of any superior court and is enforceable in the same manner as such an order.

Procedure

(2) To make a decision or order an order of a court, either the usual practice and procedure of the court in such matters may be followed or the Secretary of the Agency may file with the registrar of the court a certified copy of the decision or order, signed by the Chairperson and sealed with the Agency’s seal, at which time the decision or order becomes an order of the court.

⁹ *Pintea v. Johns*, 2017 SCC 23, para. 1; *Carey v. Laiken*, 2015 SCC 17, paras. 31-37.

¹⁰ See footnote 6, above. I do not intend to pursue criminal contempt proceedings, which require an element of public defiance.

¹¹ S.C. 1996, c. 10 at s. 33.

A procedure to file orders with the court can also be found at section 51 of Newfoundland and Labrador's *Access to Information and Protection of Privacy Act, 2015*,¹² where the Information and Privacy Commissioner can prepare orders that are enforceable against institutions.

Filing an order with the Trial Division

51. (1) The commissioner may prepare and file an order with the Trial Division where

(a) the head of the public body agrees or is considered to have agreed ...to comply with a recommendation of the commissioner ... in whole or in part but fails to do so within 15 business days after receipt of the commissioner's recommendation; or

(b) the head of the public body fails to apply ... to the Trial Division for a declaration [not to comply with the commissioner's recommendation].

(2) The order shall be limited to a direction to the head of the public body either

(a) to grant the applicant access to the record or part of the record; or

(b) to make the requested correction to personal information.

(3) An order shall not be filed with the Trial Division until the later of the time periods referred to in paragraph (1)(a) and section 54 has passed.

(4) An order shall not be filed with the Trial Division under this section if the applicant or third party has commenced an appeal in the Trial Division under section 54 .

(5) Where an order is filed with the Trial Division, it is enforceable against the public body as if it were a judgment or order made by the court.

Similar provisions can also be found in British Columbia and Alberta's freedom of information laws.¹³

A provision of this type could be added to Clause 16 of Bill C-58, at the end of section 36.1.

¹² S.N.L. 2015, c. A-1.2.

¹³ *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 59.01; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 72(6).

Enforcement of the Information Commissioner's orders via a *mandamus* application

As I explained to the committee, if an enforcement mechanism for the Information Commissioner's orders is not added to Bill C-58, then the only recourse that the requester and I would have available to try and have my order enforced is a *mandamus* application before the Federal Court, where we would ask that the institution be compelled to follow my order as a mandatory duty.¹⁴

There is no guarantee that making such an application before the Federal Court will be successful. The test, set out *Apotex Inc. v. Canada (Attorney General)* is exacting.¹⁵ I must demonstrate all of the following:

1. That there was a public legal duty to act.
2. That the duty was owed to the Information Commissioner.
3. That the Information Commissioner had a clear right to performance of that duty.
4. That special rules were met where the duty sought to be enforced is discretionary.¹⁶
5. That no other adequate remedy is available to the Information Commissioner.
6. That the order sought will be of some practical value or effect.
7. That the Court, in the exercise of its discretion, finds no equitable bar to the relief sought.
8. That, on a balance of convenience, an order in the nature of *mandamus* should be issued.

My office's review of the case law has found that *mandamus* applications are rarely successful. From 2013 to current, we surveyed 50 *mandamus* applications before the Federal Courts that resulted in decisions. Only eight were successful, the most recent in July 2018. Six of these successful applications were in the immigration context.¹⁷

¹⁴ A requester could also apply for a *mandamus*.

¹⁵ [1994] 1 FC 742 (Fed. C.A.), affirmed in [1994] 3 SCR 1100.

¹⁶ These rules are: (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

(b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

(c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

(d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

(e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

¹⁷ *Doshi v. Attorney General of Canada*, 2018 FC 710; *Yassin v. Minister of Public Safety and Emergency Preparedness*, 2018 FC 423; *Kanthasamyiyar v. Canada (Citizenship and Immigration)*, 2015 FC 1248; *Valverde v. Canada (Citizenship and Immigration)*, 2015 FC 1111; *Valverde v. Canada (Citizenship and Immigration)*, 2015 FC 1111; *Stanizai v. Canada (Citizenship and Immigration)*, 2014 FC 74; *Murad v. Canada (Citizenship and*

Suggested witness who could speak to proceedings before the Federal Court

For further information on how *mandamus* and civil contempt proceedings before the Federal Court work in practice, I would recommend Mr. Richard G. Dearden, senior litigation partner in Gowling's WLG. He can be reached at (613) 786-0135 or at richard.dearden@gowlingwlg.com. Mr. Dearden has worked with the Office of the Information Commissioner on a number of litigation files. He has appeared as counsel before the Supreme Court of Canada, all levels of court in Ontario, the Federal Courts of Canada, and he is very familiar with such procedures.

Phase two reform

Several members of the Senate Standing Committee on Legal and Constitutional Affairs asked for my opinion on what elements of the *Access to Information Act* should be reviewed during the government's mandated review to be undertaken within one year of Bill C-58 receiving Royal Assent.

There are several aspects of the Act that I would urge the government take a serious look at. More specifically:

The duty to document: No federal statute or regulation sets out a comprehensive and enforceable legal duty to create and preserve records documenting decision-making processes, procedures or transactions. Access to information relies on recordkeeping and information management to document and preserve government decisions. In today's digital age, government decision-making can derive from email and instant messaging communications. Without a legal duty to document, these conversations can be lost or deleted when they should be accessible.

Extensions: Under the *Access to Information Act*, institutions must respond to an access request within 30 days, either by giving access to the records, or by taking an extension of a reasonable period time of time, under certain circumstances. The Federal access law is an outlier in that it does not limit extensions to a precise number of days. In all but one of the provinces (Ontario) the length of time for an extension is limited to a precise number of days, ranging from 10 to 40 days. This lack of precision has contributed to a culture of delay across the government. A limit to federal extensions would decrease delays across our system, such as the sometimes significant delays resulting from consultations with third parties.

Exclusions from the *Access to Information Act*: Certain records are excluded from the right of access under the *Access to Information Act*. Most notable are Cabinet confidences (with certain exceptions). Records excluded from the Act are not always reviewable by the Information Commissioner during an investigation to determine whether or not the

Immigration), 2013 FC 1089; *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55 (affirming 2012 FC 1500).

exclusion was appropriately applied. Exclusions are a barrier to access and can hinder independent oversight.

The exemptions: Most of the exemptions under the Act are as old as the Act itself and have not received a significant review in 35 years. The exemptions do not take into account societal expectations for transparency, modern technology, or current open government practices. The Office of the Information Commissioner has thirty five years' worth of data on how these exemptions are being applied and what works, what doesn't work, and would be pleased to provide this information during second phase review.

The *Access to Information Act* came into force in 1983 when access laws were a relatively new phenomena and had not been significantly studied in practice. Since that time, model laws and guides to access have been drafted. They reflect the highest standards and best practices for access to information legislation. They also provide a framework for enacting or amending legislation.

I would highly recommend that the following resources be consulted ahead of the second phase of the *Access to Information Act's* review:

[Model Inter-American Law on Access to Public Information](#): Drafted by the Organization of American States (of which Canada is a member), in consultation with high-level public officials, experts, academics, and private sector and civil society representatives, this model law provides for the broadest possible right of access to public information among member countries. The law received 142 out of a possible 150 points on the Global Right to Information Rating—the highest score to date.

[A Model Freedom of Information Law](#): This model law, developed by the civil society group named Article 19 sets out standards for national and international freedom of information legislation, based on international and regional laws and norms, evolving state practice (as reflected in national laws and the judgments of national courts) and the general principles of law recognized by the community of nations. The United Nations and the Organization of American States have both endorsed this model law.

[Striking the Right Balance for Transparency](#): A 2015 special report prepared by the Office of the Information Commissioner on the recommended approach to a comprehensive modernization of Canada's federal *Access to Information Act*.

[Designing Freedom of Information Systems](#): A 2018 research paper commissioned by the Office of the Information and Privacy Commissioner of Alberta on the different systems governments use to administer access to information requests. The research paper was written by the Governance and Legislative Reform Group.

I hope the committee will find this information useful.

Should the committee or any Senator have any questions or wish to receive any further information, they may contact Katelyn Edwards, Policy Analyst at katelyn.edwards@oic-ci.gc.ca.

Yours sincerely,



Caroline Maynard
Information Commissioner of Canada

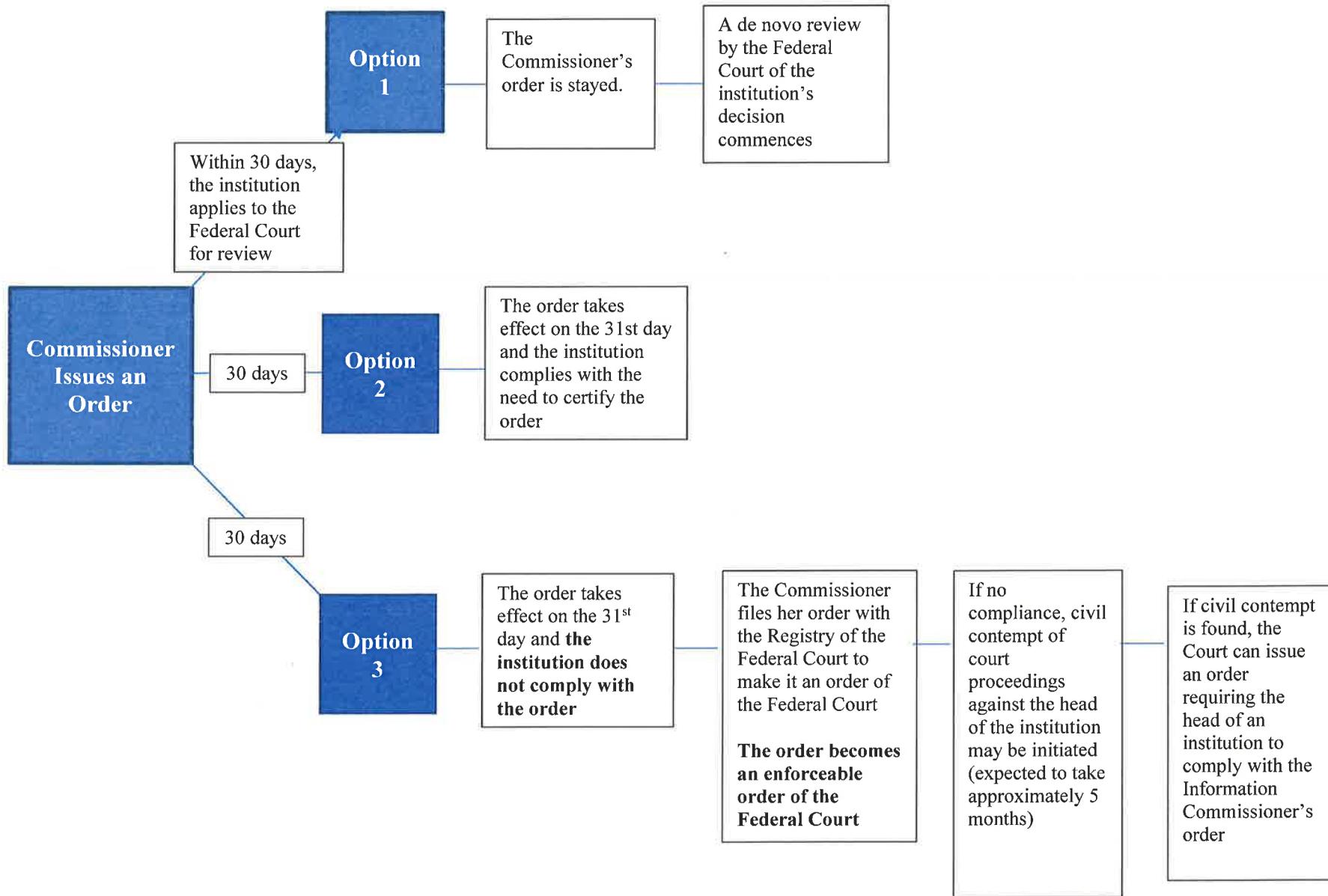
Encl.

c.c.: Pierre-Hugues Boisvenu, Deputy Chair
Standing Senate Committee on Legal and Constitutional Affairs

Renée Dupuis, Deputy Chair
Standing Senate Committee on Legal and Constitutional Affairs

Keli Hogan, Clerk
Standing Senate Committee on Legal and Constitutional Affairs

The certified order is made an order of the court



Current model – Order is not made an order of the court

