The Honourable René Cormier,
Chair, Standing Committee on Official Languages
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4

Dear Mr. Cormier:

I am writing to you today concerning your committee’s invitation to Caroline Maynard, Information Commissioner of Canada, to appear on March 18, 2019, during your study to modernize the Official Languages Act.

Thank you for this invitation. Unfortunately, Commissioner Maynard is unable to attend on that day.

In order to be of assistance to the committee, please find below a description of the compliance and sanctions regime currently found in the Access to Information Act (ATIA), the compliance measures currently being proposed in Bill C-58, an Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts, and the recommendations the Information Commissioner has made to improve the compliance regime in that bill.

**Access to Information Act: current situation**

After concluding an investigation, the Information Commissioner may issue recommendations to institutions. These recommendations are not binding. When an institution does not follow the Commissioner’s recommendations, the Commissioner may, with the complaint’s consent, apply to the Federal Court for a review of the institution’s decision to refuse disclosure. The hearing before the Federal Court is *de novo*, which means the review of the application of exemptions begins anew.

Investigations are conducted in private, however, once an investigation is concluded, the Commissioner may report to Parliament, either through an annual or special report, about her investigations. The Commissioner may use these reports to draw attention to compliance issues.
In addition, the ATIA contains two specific offences.

The first (section 67) prohibits the obstruction of the Information Commissioner and anyone acting on her behalf or under her direction in the performance of their duties and functions under the Act.

The second (section 67.1) prohibits all persons from destroying, mutilating, altering, falsifying or concealing records with the intent of denying a right of access under the Act. It also forbids directing, proposing or causing anyone else to do any of the prohibited acts.

Every person who contravenes these offences is guilty of:

(a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding $10,000, or to both; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000, or to both.

The Information Commissioner has no authority to determine criminal wrongdoing or issue fines herself. When, in her opinion, she has evidence relating to the commission of an offence, she refers the matter to the Attorney General.

No one has ever been criminally charged for an offence under the ATIA. If fines are to be laid under the ATIA after criminal wrongdoing has been determined, these are imposed by the court.

Bill C-58, an Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts

Bill C-58 is the government’s first phase of reforms to the ATIA. This bill is currently being studied by the Standing Senate Committee on Legal and Constitutional Affairs.

In terms of enhancing compliance with the ATIA, Bill C-58 includes two particular amendments.

First, it would give the Information Commissioner the ability to issue orders on well-founded complaints. If an institution wishes to seek Federal Court review, they must do so within 30 days from receipt of the Commissioner’s order. Review before the Federal Court remains de novo.

Second, it would allow the Commissioner to publish orders and recommendations before first reporting on these matters to Parliament.
The Commissioner expects both of these amendments will provide clarity as to her office’s positions in particular cases and will result in the ATIA being applied more consistently across the government.

However, there is still room for improvement in the bill. At present, the bill includes no mechanism for the Commissioner’s orders to be certified as orders of the Federal Court. This means that, apart from a mandamus application, where the Commissioner would ask the Federal Court to order a government institution to take a positive action, there is no recourse available in Bill C-58 to address situations where an institution simply decides not to comply with an order issued by her. As such, the Commissioner has recommended to the committee studying the bill that such a mechanism be added.

I hope this information proves useful to your committee.

Should you or any member of your committee wish to have any further information, they may contact Catherina Viveiros at 819-994-1648 or at catherina.viveiros@ci-oic.gc.ca.

Yours sincerely,

Gino Grondin
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Office of the Information Commissioner of Canada

c.c.: Rose-May Poirier, Vice-Chair
Standing Committee on Official Languages

François Michaud, Clerk,
Standing Committee on Official Languages