

**REFORMING  
ACCESS TO  
INFORMATION :**

**CHOOSING  
TRANSPARENCY**

**SUMMARY**

**20** **YEARS**

**THE ACT RESPECTING  
ACCESS TO  
DOCUMENTS HELD BY  
PUBLIC BODIES AND  
THE PROTECTION OF  
PERSONAL  
INFORMATION**

Design and production: Commission d'accès à l'information

Legal deposit-2002  
Bibliothèque nationale du Québec  
National Library of Canada  
ISBN 2-550-40110-7  
CAI-RA-002-02-A

Gouvernement du Québec 2002

This report is available on the Commission's web site at the following address: [www.cai.gouv.qc.ca](http://www.cai.gouv.qc.ca)

All rights reserved for all countries.

Reproduction by any process and translation, even if partial, are authorized if the source is indicated.

November 2002

## TABLE OF CONTENTS

	Page
<b>MESSAGE FROM THE PRESIDENT</b> .....	1
<b>INTRODUCTION</b> .....	3
<b>PART 1 - REFORMING THE QUÉBEC ACCESS TO INFORMATION SYSTEM</b> .....	7
1.1 Automatic publication of information .....	7
1.2 Access to opinions and recommendations .....	9
1.3 The role of the person in charge of access .....	9
1.4 The role of the Minister of Relations with Citizens and Immigration .....	10
<b>PART 2 - PROTECTION OF PERSONAL INFORMATION IN THE PUBLIC SECTOR</b> .....	11
2.1 Information technology.....	8
2.2 Authorization of access for research purposes .....	12
<b>PART 3 - THE COMMISSION D'ACCÈS À L'INFORMATION</b> .....	13
<b>PART 4 - LIST OF RECOMMENDATIONS</b> .....	15

## MESSAGE FROM THE PRESIDENT

Twenty years ago, Québec adopted the *Act respecting access to documents held by public bodies and the protection of personal information*. This innovative law endorsed the principles both of access to documents held by the government and public bodies and protection of the personal information they hold. At the same time it entrusted monitoring of the application of these principles to a single agency, the Commission d'accès à l'information. The adoption of this Act made Québec a trailblazer in this new field of law.

Continuing along the same lines more than eight years ago, Québec enacted the *Act respecting the protection of personal information in the private sector*. At the time, this set a precedent in North America.

When these Acts were adopted, Québec was a pioneer. Twenty years later, is Québec still in the forefront of this field? To preserve and consolidate the Québec model, which has been a source of inspiration for many provinces and states around the world, we believe that a reform is necessary.

Since the adoption of the rules governing access to information in the public sector, a generation has grown up. During this period, the social and political environment has changed enormously. The forces of economic globalization and international data flows have become a reality shaping our daily existence. In their wake, we have different expectations regarding the information available to citizens. New information and telecommunications technologies have created ultrarapid means of communication, reinforcing the possibility of quick access to information.

Technology is offering formidable tools for surveillance of individuals by the state or even by each other, weakening traditional community ties. Many have observed that these changes undermine citizens' interest and confidence in the usual channels of democratic expression, essentially the mechanisms of electoral representation. Consequently, in Western societies, we see an increasing interest in strengthening the direct expression of democracy.

How does our legislation meet these new expectations? Has the culture of government administrative secrecy, prevalent when the Act was introduced in the early 80s, given way to a culture of transparency?

In one generation, our legislation has aged enormously. Initially imitated by Canadian provinces and then by some European states, the model has been overtaken by a new approach that seeks to make public bodies not only accountable for their management, but more sensitive and more attentive to citizens' needs, thus reducing the obligation of citizens to request information piecemeal.

Our examination of the current legislation must also consider decisions or initiatives taken elsewhere. An example is the case of the very recent Supreme Court of Canada decision in the matter of *Macdonell v. Attorney General of Québec and National Assembly and Commission d'accès à l'information*. This judgment, the first rendered by the Supreme Court on the Access Act, deserves analysis and examination. The decision challenges our collective commitment to move in the direction of greater public transparency. For the legislator, this surely provides substance for in-depth reflection.

The adoption in 2000 of the federal government's *Personal Information Protection and Electronic Documents Act*, which is gradually coming into force until 2004, risks substantially reducing the scope of our Québec legislation. Here again, vigilance and objectivity are essential to guarantee Quebecers that a fundamental right is respected.

At the beginning of this new century, the right to know is recognized as a basis and a prerequisite for the exercise of other rights in a democracy. From now on, it is the state, in all its forms, that must make information accessible to citizens, without their having to take the initiative. Of course, this reversal of the current practices should be applied in a reasonable manner, given the inevitable imperatives of security and good administration.

The major theme of this report is the necessary transparency of the state, which would translate into the reversal of the roles currently played in the public sector by those holding and those requesting information.

Making information automatically available to the public, without it being necessary to file an access request to obtain it, is the key idea of the reform we hope to introduce to the existing access to information system. In fact, what the Commission proposes to the legislator is a veritable reworking of the access to information system. This reform will breathe new vitality into this Act which is essential to our democracy.

Other recommendations support this concept of transparency of the state, particularly those dealing with the role of the person responsible for access to information in public bodies, and the application of the Act to certain public bodies. Public sector and private sector legislation provisions in case of litigation are another key aspect of a process that must be simple and practical for the persons involved.

The Commission's report would be incomplete without mentioning the growing incursion of new information technology into privacy. Because of increasingly efficient technologies, gigantic databases are being created. Such technological development cannot take place without an evaluation of the impact of these new realities on the protection of personal information. Even though major attention has been paid in the past five years to the protection of personal information in the public sector, and particularly in the Québec Government, the implications of the technology which is now available necessitate constant vigilance.

Our legislation needs a major reform. This must be done in the near future so that our citizens can benefit from all the possibilities and the full protection of rights that a modern democracy can offer. This is precisely what the Commission d'accès à l'information proposes in this Five-Year Report.

In conclusion, I would like to salute the considerable work accomplished by the members of the Commission's staff, who combined their expertise and efforts to produce this Five-Year Report. On behalf of all of my commissioner colleagues, I thank them for this remarkable contribution and especially for their loyal commitment to the Commission.

JENNIFER STODDART

## INTRODUCTION

Many changes can occur in five years. This is simply the reflection of a constantly changing society. Whatever the case may be, of all the aspects that concern us today, we can surely mention the right to information. In the online age brought by the advent of new technology, what is happening to access to information and protection of personal information?

This is the basic question behind the production of the Five-Year Report of the Commission d'accès à l'information. Writing such a report requires reflection and, above all, a lot of experience in this field. In this sense, Judge Gonthier declared in a recent Supreme Court decision: "By virtue of the fact that it is always interpreting the same Act, and that it does so on a regular basis, the Quebec Commissioner develops general expertise in the field of access to information".<sup>1</sup>

Adopted twenty years ago, the *Act respecting access to documents held by public bodies and the protection of personal information* imposes the obligation on the Commission d'accès à l'information to issue a report every five years on the implementation of this Act. Since 1994, a similar obligation is prescribed for the implementation of the *Act respecting the protection of personal information in the private sector*.

This fourth Five-Year Report of the Commission is divided into five parts.

Part 1 is devoted to access to documents held by public bodies and administrative transparency. This part, which is meant to be the core of the Commission's Report, proposes a major reform of the Québec access to information system.

Part 2 covers protection of personal information in the public sector. Information technology and research authorizations drew the Commission's attention.

Part 3 of the Report deals with the implementation of the *Act respecting the protection of personal information in the private sector*. The Commission's reflections on issues related to genetics, identity cards, cybersurveillance of workers and information collected concerning tenants will be discussed in Part 4.

Finally, a fifth and last part comments on the Commission's mandates and the tools made available to fulfill them. The Commission's necessary independence of ministerial authorities is also discussed.

The following pages are a summary of the important points the Commission wishes to highlight. **We should add that the list of recommendations is found in Part 4.** If you want to obtain more information, we invite you to consult the full version of this report, which is available on our web site at the following address: [www.cai.gouv.qc.ca](http://www.cai.gouv.qc.ca).

---

<sup>1</sup> Macdonell V. Québec (Commission d'accès à l'information nationale), 2002, CSC 71.

---

## PART 1 – REFORMING THE QUÉBEC ACCESS TO INFORMATION SYSTEM

---

The Access to Information Act recognizes the existence of the right to information and implements a whole series of measures conceived 20 years ago to make this right effective. However, the approach adopted by the legislator forces the person applying for access to take various steps to obtain the document sought.

Quite often, the preliminary approach to obtaining a document will involve little effort. For example, the applicant may make an oral request to a public body to obtain a document. This document may be consulted on site, in a reading room, whether electronic or not, or be transmitted to the applicant by regular mail or e-mail. The applicant may also be informed of the location where the document can be obtained or the address of a relevant web site.

However, if the document is not among those that are published or widely distributed by the public body, the applicant will have to submit his request to the person in charge of access, correctly identifying the document required, and then wait for follow-up action before finally being able to obtain what he wants. Quite often, these formalities are an obstacle to access to information.

Moreover, the delay in processing a request for access will sometimes have the effect of rendering the information sought devoid of interest.

This is why the current access to information methods prescribed by the Act must evolve and tend to the widest possible dissemination of information held by the State. It is time to imagine other approaches that will facilitate the exercise of the right to information and, at the same time, even greater transparency of public bodies.

### 1.1 AUTOMATIC PUBLICATION OF INFORMATION

According to the Commission, public bodies must now review how they manage their documents, with the primary objective of rendering them more readily accessible and minimizing the steps that applicants for access must take to obtain them. The equation is obvious: the less procedures there will be to obtain a document, the better the right to information will be respected.

In fact, the proposal formulated by the Commission can be summed up as achieving two objectives: enable citizens to know what information is held by the State and, subject to the application of the restrictions on access set out in the Act, allow access to this information without any formalities.

**This does not mean doing a few minor touchups or making minor adjustments that would give the impression that citizens will be better served. On the contrary, it means adopting a totally different approach. Instead of waiting for the request for access to a document, the public body should ensure automatic publication of the information when it is created. In fact, the general principle should be the automatic publication of information, while the request for access filed with the person in charge of access should become the exception. The Commission therefore proposes that public bodies have the obligation to adopt a policy on automatic publication of information.**

- **The Publication Plan**

To implement this policy, public bodies should provide for the adoption of an Information Publication Plan. This Plan would contain the categories of information or documents for which distribution would be mandatory upon their creation.

This Plan would enable citizens to know what categories of information are distributed by the public body. Considering the facilities offered by new information technologies, the Commission considers that this

Plan should provide for the publication of an abundant variety of information, not limited merely to information on the services offered by the public body.

- **The General Index of Documents**

Out of a concern for transparency, the public bodies should also draw up a General Index of their documents. This Index this time would include the list of all documents held by the body, including those that are not part of the Information Publication List. Such a tool would allow anyone to know the information that can be obtained from the body.

This Index could also indicate that a document is accessible without any formalities and indicate the place where it can be accessed. As digitization of documents becomes the norm, the General Index could establish an electronic link to the accessible documents.

- **The Plan and the Index: Tools of transparency**

The Plan and the Index should become information management tools that would allow Government employees and citizens to have a better knowledge of the documents held. Any Government employee called upon to be in contact with the public would thus know that he can disclose a document without fear of inappropriate disclosure.

To carry out this exercise, each public body obviously should consider its particular situation and the specific nature of each document. This does not mean denying the existence of restrictions on access or going online with personal information or documents that are recognized as confidential by the legislator, but actively disseminating information that should be accessible under the Access Act.

To facilitate the development of plans, public bodies could form sectorial tables to discuss document classification methods, the automatic public nature of certain types of documents or any other document management issues under the application of the Access Act. These groups could reflect the different types of public bodies: government departments, government agencies, municipal bodies, school bodies, health and social service institutions.

What categories of documents should be published automatically? Of course, each public body should provide its own answer to this question. However, we can give a few examples here of categories of documents for which automatic publication seems most appropriate.

Some types of documents have a public character by law. This is the case, for example, for the minutes of municipal councils or health and social service institutions. So why not make these documents automatically accessible instead of waiting for a written request for access? If consultation of the body's Information Publication Plan and General Index of Documents makes it possible both to know the existence of minutes and have access to them, everybody wins. This approach could reduce the number of requests for access that the person in charge of access has to process and allow a person to have quick and anonymous access to the document sought.

There could be automatic disclosure of documents covered by disclosure under the Access Act and that are usually the object of numerous requests for access. To draw up the inventory of documents covered by automatic publication, the applications for information submitted to the public body could also be analyzed, as well as the comments transmitted to it by citizens or any other way of assessing their information needs.

Directives and other internal documents likely to have direct effects on the public body's relations with the public are not published or distributed systematically. The State's transparency would be greatly improved if, as is the case in the United States and New Zealand, the obligation of automatic disclosure of this information was prescribed.

For example, the following information could be disclosed automatically for each public body: information regarding its organization, services pertaining to its mission, the name, coordinates and functions of the staff members called upon to have contact with the public. The automatic publication policy should



also cover policies, manuals, directives and other principles applied in the public body when they have a direct influence on the relationship between it and the subject persons.

## **1.2 ACCESS TO OPINIONS AND RECOMMENDATIONS**

Section 37 is invoked more often than not and closes off access to a document. This provision allows a public body to refuse to disclose a recommendation of an opinion made within the past ten years by one of its members, a member of its staff, a member of another public body or a member of the staff of that other body in the performance of their duties. The person in charge of access can also refuse to disclose a recommendation or opinion presented less than ten years earlier at his request by a consultant or an adviser on a matter within his jurisdiction. This restriction on access to information is meant to protect information that has an impact on administrative or political decisions.

Without necessarily wanting to deny the importance of the objectives pursued by this restriction on access, the scope of this restriction can be questioned twenty years later. This reflection is all the more necessary in that Section 37 is used for all purposes and the refusal to disclose a document is quite often based on this provision. It is very clear that protection of the decision-making process is an important objective that is justified in our political system. However, this observation should not create automatic reflexes and serve as an easy pretext for refusing to disclose documents useful to public debate.

More and more, citizens want to exercise control over those who govern them, not only once every four years at election time, but during the mandate. This is the meaning that must be given to the new *Act respecting public administration*<sup>2</sup> imposing accountability on managers. How can the achievement of these objectives be assured if citizens do not have the opinions and recommendations that served as the basis for the decisions?

This is why the Commission invites the legislator to study the possibility of making opinions and recommendations accessible as soon as the decision-making process is completed.

We should add that, in default of making notices and recommendations accessible as soon as the decision resulting from them is made, the Commission recommends that the 10-year retention period stipulated in Section 37 be reduced to 5 years.

At the same time, the Commission recommends that the person in charge of access to documents have the obligation, before refusing to disclose an opinion or a recommendation, to inquire into the prejudice that could result from such disclosure. If it is impossible to identify such prejudice, the document should be disclosed. This person in charge of access should be able to rely on decision help tools developed by the Minister of Relations with Citizens and Immigration.

## **1.3 THE ROLE OF THE PERSON IN CHARGE OF ACCESS**

Wishing to emphasize the importance of this function, the legislator has expressly provided that the highest authority within a public body perform the functions of person in charge of access to documents. If this function is delegated, which is generally the case, it can only be delegated to a member of management.

It could be believed that the role of the person in charge of access is limited to receiving requests for access, processing them, seeing that the information is transmitted if it is accessible or, on the contrary, refusing to disclose the information and giving written justification of such refusal. Such is not the case or, at least, it should not be the case!

The Access Act seeks to favour wide access to public documents while protecting certain information deemed to be sensitive. Quite often, it will be up to the person in charge of access to determine whether information is sensitive or not. The favourable or unfavourable response to a request for access will therefore depend on his judgment.

---

<sup>2</sup> R.S.Q., V. A-6.01.

Many restrictions of access are optional and the fate reserved for a request for access will quite often depend on how a person in charge of access exercises his discretionary authority. There is no doubt that the exercise of the discretionary power is not an easy task, but depends on the attitude the public body adopts regarding the Access Act: an attitude of openness and transparency, as called for by the Act, or, on the contrary, an attitude that denotes suspicion and skepticism regarding information disclosure obligations.

A person in charge of access should also be an access to information ambassador to his public body. He could make its personnel aware of the importance of the Act and the objectives it pursues.

An essential cog in the administration of the Access Act, the person in charge of access should be able to count on all the necessary support within his organization so that he can fully play the role assigned to him. This support is all the more necessary in that it is essential to achieve the objectives sought by the Act, namely to ensure the maintenance of healthy democracy and a more transparent government.

The person in charge of access therefore should enjoy great independence in the performance of his duties. His autonomy should be strengthened and his role enhanced. However, this independence should not mean that the person in charge of access is excluded from the life of the organization. On the contrary, his integration into the organization remains essential to give him a good knowledge of the context and all the relevant factors that will allow him to do a complete analysis of the requests for access submitted to him.

The support provided to the person in charge of access by the highest authorities of the public body should go beyond mere moral support. All the necessary human or financial resources should be made available to the person in charge of access. In addition, when the volume of requests for access justifies it, the person in charge of access should be able to devote all his time solely to activities related to the processing of these applications.

The persons in charge of access to documents should also have the possibility, upon assuming office, to take training on the Access Act. Continuing education should also be offered to the persons in charge of access. Since information technology is an indispensable tool for the better distribution of information and quick and efficient processing of requests for access, the training provided to the personal in charge of access to documents should include these subjects.

To make the persons in charge of access more accountable, public bodies should reserve a section of their annual management report for the activities of the person in charge of access. The annual report of each public body should therefore serve as a medium to account for the activities of the person in charge of access to documents. A section of the public body's annual report should be devoted to the review of activities of the person in charge of access and the implementation of the Access Act. In addition to determining its contents, the person in charge of access would assume complete responsibility for this section of the report by signing it. The section of the annual report that would be devoted to the activities of the persons in charge of access activities would be all the more justified in that he must enjoy a certain independence in the performance of his duties.

In the Commission's view, making the persons in charge of access to documents more accountable and obliging the public bodies to reserve a section of their annual management report for the persons in charge of access' activities would be an important component of recognition of the right to information.

#### **1.4 THE ROLE OF THE MINISTER OF RELATIONS WITH CITIZENS AND IMMIGRATION**

For the Commission, there is no doubt that it alone cannot take responsibility for promoting the right to information, especially since the Act does not assign it a specific mandate for this purpose. The Minister responsible for the administration of the Access Act therefore has a major role to play in making it known both within the Government apparatus and to the general public. He bears the responsibility for promoting this Act.

It can be affirmed, without great risk of error, that the component of the Access Act regarding access to administrative documents is more or less known to all public service personnel. In fact, in the past few years, there has been more emphasis on the component of the Act devoted to the protection of personal information.

The Department should also continuously collect the necessary statistical data from the persons in charge of access to documents of public bodies to profile the Access Act's administration and compliance. Precise data collected by means of specific software or other tools common to all persons in charge of access would allow better reflection on the changes required to improve the exercise of the right of access.

The publication of these data in the Department's annual management report would also allow the legislator to obtain a revealing profile of the Act's administration. Several advantages would result from reliance on these common monitoring tools. For example, the persons in charge of access would have a tool that would allow them to produce the annual review of their activities more easily, for inclusion in the public body's annual report.

---

## **PART 2 - PROTECTION OF PERSONAL INFORMATION IN THE PUBLIC SECTOR**

---

The development of information technology provides its share of benefits in every day life. On the other hand, this development involves major challenges regarding the protection of privacy, particularly concerning the personal information held by the State. The Commission d'accès à l'information has observed in the course of the studies and evaluations it has conducted in the government information technology field that these challenges in terms of protection of personal information are always present.

### **2.1 INFORMATION TECHNOLOGY**

- **Compliance with the principles of protection**

Over the past few years, the vast majority of government departments and agencies have taken action by implementing concrete security measures to ensure the confidentiality of the personal information they hold.

However, for some managers, the adoption of measures and action plans can create a false impression that they have taken the necessary steps to apply the principles of protection of personal information. In fact, guaranteeing the security of personal information is not enough. It is also essential that the rules regarding the collection, use or communication of personal information be observed. Even though the best security measures have been implemented, a public body will no longer have the right to collect information that is unnecessary to the performance of its functions. Security and protection of personal information are two concepts that must be distinguished.

Government departments and agencies must take special care to make the designers and architects of these information systems aware of the principles of protection of personal information. They must also involve the persons in charge of protection of personal information in the development work on their information system.

The introduction of new technologies, such as biometric measurements, identity certificates, surveillance cameras and smart cards, are certainly means intended to provide greater security but also involve constraints regarding the protection of personal information. In the Commission's view, public bodies should always analyze the risks for protection of personal information during the preliminary design work on these systems.

- **Information in the health-care sector**

There is no longer any doubt that the legal framework regarding personal information in the health-care sector is not adapted to the reality of an electronic patient record accessible in an integrated care and service network.

The Commission recognizes the necessity of improving the flow of health information and believes that technology can facilitate the achievement of this objective. However, the very great sensitivity of health information and the multitude of stakeholders in the health and social services network oblige a very rigorous choice of means to respect the fundamental rights of the persons concerned. The recent debate on the draft health-care bill is demonstrative enough of the stakes involved.

Based on clearly defined objectives and a solid evaluation, the development of one or more electronic data interchange models on a local or regional scale would make it possible to build a technological solution favouring a better flow of citizen health information and thus meeting the needs of the health-care system's stakeholders.

- **Separation of data banks**

The marked trend to ever greater concentration and centralization of personal information in every sector of government activity requires that the legislator clearly affirm the concept of separation of data banks held by public bodies.

Without separation of their personal information data banks, public bodies will not be able to guarantee citizens respect for their right to know the purposes for which the personal information concerning them is used.

The Commission requests that the concept of separation of data banks held by a public body be clearly recognized in the Access Act.

## **2.2 AUTHORIZATION OF ACCESS FOR RESEARCH PURPOSES**

The Access Act confers on the Commission d'accès à l'information the responsibility to authorize researchers to receive communication of nominative information held by public bodies, without the consent of the persons concerned. A similar provision exists in the Private Sector Act.

Government departments and agencies undeniably are the two types of holder bodies the most solicited by researchers wishing to access nominative information within the context of their research. Among this nominative information, the data held in the files of the Régie de l'assurance maladie du Québec are the most coveted. In fact, health is the biggest research field by far. In the past five years, 56% of all applications processed by the Commission pertained to this field. University and hospital researchers are particularly active in requests for research authorizations. In their case, it is not unusual for the size of the samples constituted for research purposes to be composed of a population greater than 100,000 persons, since the subjects of their studies pertain to themes that require a vast sample. There is no reason to be surprised at this situation.

- **Admissibility of a request for authorization**

The legislator has determined three criteria that must preside over the issuing of a research authorization request. It must be proved to the Commission's satisfaction that the intended use is not frivolous, that the end contemplated cannot be achieved unless the information is communicated in nominative form and, finally, that the information in question will be used in a manner that ensures its confidentiality.

The constantly growing volume of data solicited, the sensitivity of the data covered by the applications for authorization and the various storage environments of these data lead the Commission to propose that a fourth condition related to security measures be added. Consequently, an amendment should be made to the Access Act so that the Commission can grant an authorization only if security measures assure the confidentiality of the personal information.

- **The Commission's limited oversight**

Researchers who conduct studies in the health-care sector often must file parallel research authorization applications both with the Commission d'accès à l'information and with the directors of professional services

of each health-care institution holding the required nominative information. In fact, this way of proceeding is specified in certain laws in force, notably the Act respecting health services and social services.

In this perspective, the Commission is required to proceed with partial studies of applications. It cannot ensure in its analysis that all of the criteria presiding over its decision will be considered.

Thus, the Commission only has limited oversight over research because it does not know what data a researcher obtains from a hospital. The same principle applies to the Commission de la santé et de la sécurité du travail.

To fulfill this important mandate, the Commission recommends that the Access Act be amended to provide that only the CAI can authorize researchers to obtain the desired data.

- **Responsibility of public bodies holding nominative information**

As the guardian of a multitude of personal information, the holding body must remain accountable for the personal information it transmits to a researcher following a favourable opinion by the Commission. This means establishing a stricter process that will allow the holder to be part of the approval mechanism.

In other words, before the application is submitted to the Commission, the public body should proceed with an initial analysis of the application for authorization to apply the test of necessity between the object of the research and the data requested by the researcher.

After the Commission has given its approval for disclosure of nominative information, the holding body should see to the observance of the conditions laid down and report annually to the Commission. For this purpose, a contractual relationship between the holding body and the researcher should guide the observance of conditions intended to ensure the confidentiality of information.

- **Emerging trends**

For some time, the Commission has been made aware of, and in fact was sometimes submitted cases of researchers who want to obtain, on a permanent basis, files held by the State to constitute datawarehouses or create communications links with these warehouses.

The Commission would welcome the holding of parliamentary hearings for this purpose, at which the different partners could argue their interests and defend the principles they endorse, in complete transparency.

---

## **PART 3 – THE COMMISSION D’ACCÈS À L’INFORMATION**

---

- **A multifunctional body**

Both the Access Act and the Private Sector Act endow the Commission d’accès à l’information with vast powers that allow it to exercise mandates of the same scope and achieve the objectives pursued by these laws.

In modern administrative jargon, the Commission is a multifunctional organization. In creating the Commission, the legislator at the time made a deliberate choice, deciding to combine adjudicative and administrative functions in the same body. This pragmatic approach had the advantage of constituting a body of modest size at a time when the Western world, Québec not excluded, was going through a major economic crisis<sup>3</sup>.

Beyond this pragmatism, this must be seen as a real commitment to create a single point of service for citizens.

This type of organization, relatively rare in the Québec administrative apparatus, is found in several other countries, where the national commissions very often have several mandates. There is a kind of convergence in this field that favours concentration of powers in one and the same organization.

---

<sup>3</sup> NATIONAL ASSEMBLY OF QUÉBEC *op. cit.*, note 2, p. 3524 and sqq.

We must add that the right to information and the right to privacy are two rights recognized by the Charter of Human Rights and Freedoms. This makes choices necessary from time to time. Should access to information be favoured to the detriment of protection of personal information? Does personal information merit the recognized protection when some would instead favour government transparency? This is the type of problem the Commission encounters when, for example, a person applies for access to an expense account of a member of a public body, or when an individual wants to consult a municipal assessment roll. The search for a balance between these two rights often turns out to be a delicate exercise that requires expertise that the Commission has been able to develop thanks to the two mandates it exercises jointly

- **Limited resources**

Since its creation, the Commission cannot count on sufficient human, financial and physical resources. Successive Presidents of the Commission have pointed this out. Despite these repeated reminders, there seems to be a shortage of arguments to convince the Government to invest relatively modest amounts to allow the Commission to escape its characteristically destitute condition.

However, over the years, the Commission has taken advantage of several forums to emphasize the pressing need to allocate additional resources, particularly in monitoring and control matters<sup>4</sup>. Echoing these repeated requests, parliamentarians have repeatedly recommended an increase in the Commission's budget. In all fairness, this budget has been increased. However, the Commission still does not have the necessary human, physical and financial resources to allow full performance of the mandates assigned to it by the Access Act and the Private Sector Act. Over the period covered by this Report, the Government has granted specific amounts for some mandates in particular. However, staff and budget disappeared once these mandates were completed.

- **A connection that ought to be reconsidered**

The National Assembly appoints the five members of the Commission. This is also the case for members of the Commission des droits de la personne et des droits de la jeunesse, the Director General of Elections, the Public Protector, the Auditor General and the Lobbying Commissioner. This method of appointment confers independence of government departments and agencies on all the persons thus appointed. In the Commission's case, it must be pointed out that its members sit regularly in review of decisions made by these public bodies and are called upon to issue opinions on projects submitted to it by the Government. Nonetheless, the Commission's budget emerges from that of the ministère des Relations avec les citoyens et de l'Immigration. Only the Commission des droits de la personne et de la jeunesse is in a similar situation. In other cases, the Office of the National Assembly grants the budget. In our opinion, this assures the Commission's greater independence of specific Ministers or departments.

We must immediately note that the Commission has not been subjected to undue government pressure. However, the Commission is concerned about the appearance of conflict when it has to discuss its budget with a Minister and a ministerial team when, at the same time, it must study applications for review that involve this Minister's department. In all logic, we believe that the solution adopted for most public bodies, and more recently, for the Lobbying Commissioner, justifies the Commission's complete attachment to the National Assembly.

This recommendation of the Commission does not mean that the Access Act and the Private Sector Act must be amended. On the contrary, it is provided that the Minister of Relations with Citizens and Immigration remains the Minister responsible for the administration of these Acts. This approach allows more uniform administration of the law in the government apparatus and assures the presence of a ministerial respondent before the National Assembly.

---

<sup>4</sup> NATIONAL ASSEMBLY OF QUÉBEC, Commission de la culture, 1<sup>st</sup> session, 36<sup>th</sup> Legislature, February 20, 2002.

## PART 4 – LIST OF RECOMMENDATIONS

---

### ACCESS TO DOCUMENTS HELD BY PUBLIC BODIES

#### Recommendation No. 1

*The Commission recommends the maintenance of the Act respecting access to documents held by public bodies and the protection of personal information. However, it recommends that major amendments be introduced quickly, particularly regarding access to information.*

#### Recommendation No. 2

*The Commission invites the legislator to consider the appropriateness of amending the Charter of Human Rights and Freedoms so that the right to information can enjoy protection equivalent to that of fundamental freedoms and rights, political rights or judicial rights.*

#### Recommendation No. 3

*To promote a better understanding of the reasons behind a refusal to disclose a document, the Commission recommends that Section 50 of the Access Act be amended to oblige the person in charge of access to inform the applicant, when the context is conducive to this, what prejudice the disclosure of the document could cause, what decision-making process is currently under way and when the document can be accessible.*

#### Recommendation No. 4

*The Commission recommends that the Minister of Relations with Citizens and Immigration begin a process of reflection, in collaboration with the persons in charge of access to documents, that should lead to the establishment of guidelines or decision help tools to support the persons in charge of access when they have to exercise a discretionary power resulting in refusal to disclose a document.*

#### Recommendation No. 5

*To facilitate access to documents held by public bodies, the Commission proposes that each public body be obliged to adopt a policy on automatic publication of information.*

#### Recommendation No. 6

*Each public body should be obliged to adopt an Information Publication Plan. Any document that would be of the nature described in the Plan would have to be published or distributed.*

#### Recommendation No. 7

*The Commission also recommends that public bodies be obliged to draw up a General Index of Documents. This index would replace the current classification list kept under Section 16 of the Access Act. It would make it possible to know what information is held by each public body.*

#### Recommendation No. 8

*The Commission invites the legislator to study the possibility of making opinions and recommendations accessible once the decision-making process is completed. This approach would have the benefit of treating opinions and recommendations on the same basis as analyses and, above all, it would consider the increasingly manifest desire of citizens to participate in society's great debates.*

**Recommendation No. 9**

*The Commission recommends that the document access officers be obliged to assess the prejudice that could probably result from communicating an opinion or a recommendation. For this purpose, the person in charge of access should be able to rely on decision help tools developed by the Minister of Relations with Citizens and Immigration.*

**Recommendation No. 10**

*The Commission recommends that public bodies assess all of the tasks performed by the person in charge of access and, depending on the result, allocate the required human, financial and physical resources.*

**Recommendation No. 11**

*The Commission recommends that the persons in charge of access to documents have the possibility, from the time they assume office, to take training on the Access Act. Continuing education should also be offered to the persons in charge of access. The Minister of Relations with Citizens and Immigration should be responsible for the implementation of these training and education programs.*

*Since information technology is an indispensable tool for better distribution of information and quick and efficient processing of requests for access, the training provided to the persons in charge of access to documents should also include these subjects.*

**Recommendation No. 12**

*The Commission recommends that the Access Act be amended to provide that the annual report of a public body must contain a report of the person in charge of access to documents concerning his activities for the past year.*

**Recommendation No. 13**

*The Commission recommends that the Minister of Relations with Citizens and Immigration be able to play a strong leadership role with a network of persons in charge of access to documents and that, in this regard, one of his obligations be to ensure the training of these persons in charge of access.*

**Recommendation No. 14**

*The Commission recommends that the ministère des Relations avec les citoyens et de l'Immigration promote the use of common monitoring tools to obtain all the relevant information on management of requests for access to documents.*

**Recommendation No. 15**

*The Commission recommends the adoption of provisions concerning the professional orders contained in Bill 122.*

**Recommendation No. 16**

*The Commission recommends that all bodies whose funding is largely assured by the State be subject.*

**Recommendation No. 17**

*The Commission therefore reiterates its recommendation to revise the definition of municipal body that appears in the Access Act so as to take into account the composition of the board of directors and the source of funds.*



**Recommendation No. 18**

*The Commission renews the recommendation formulated in the 1997 Five-Year Report, whereby any person should be entitled to access to information concerning a private educational institution contemplated by the second subsection of Section 6 of the Access Act.*

**Recommendation No. 19**

*The Commission therefore again proposes the reduction of the time limits prescribed in Sections 30, 33, 35 and 37 of the Act.*

**Recommendation No. 20**

*The Commission again proposes that Section 30 be amended to provide that the person in charge of access may not refuse access to a decision or an Order-in-Council of the Cabinet or a decision of the Conseil du trésor dating back more than twenty years.*

**Recommendation No. 21**

*The Commission wishes the legislator to reduce the period of 25 years stipulated in Section 33 to a retention period of 15 years.*

**Recommendation No. 22**

*The period of 15 years stipulated in Section 35 of the Act should be reduced to a period of 10 years.*

**Recommendation No. 23**

*In default of making opinions and recommendation accessible once the decision resulting from them is rendered, the Commission recommends that the 10-year retention period stipulated in Section 37 be reduced to 5 years.*

**Recommendation No. 24**

*The Commission again recommends that the petition for permission to appeal be abolished, except when the appeal concerns a final interlocutory decision which the final decision cannot remedy.*

**Recommendation No. 25**

*The Commission again recommends that Section 61 of the Private Sector Act and Section 147 of the Access Act be amended to avoid the filing of petitions for permission to appeal as long as the Commission has not heard all of the evidence and rendered a final decision in this regard.*

**Recommendation No. 26**

*The Commission again recommends that the Court of Québec not be able to award costs against a person who has filed an application for review or an application for study of a disagreement with the Commission if the Commission's decision is appealed by the other party.*

**Recommendation No. 27**

*To recognize the complete exercise of the right of access, a public body that appeals a decision rendered by the Commission that is unfavourable to it should therefore assume all the judicial and extrajudicial costs of the natural person in whose favour the Commission rules.*

**Recommendation No. 28**

*The Commission again recommends standardization of the penal provisions of the Access Act and the Private Sector Act. Sections 158 to 162 of the Access Act should be reformulated to subject the offences described therein to a regime of strict responsibility.*

*Moreover, the amount of the fines prescribed by these two Acts should also be equivalent. A penal provision should be added to the Private Sector Act so that sanctions can be imposed for non-compliance with orders rendered following an inquiry.*

*Finally, the good faith defence recognized in Section 163 should give way to proof of due diligence.*

**Recommendation No. 29**

*The Commission recommends that a provision be added to the Access Act that would stipulate that the interests of the child shall prevail when a person who is entitled to do so applies for access to that child's file.*

**Recommendation No. 30**

*The Commission recommends that the legislator clarify the Access Act and the Private Sector Act so that it be forbidden to refuse a person access to information that concerns his state of health, unless this disclosure probably risks creating serious prejudice for his health and that the laws, regulations and Codes of Ethics of the professional orders be adapted accordingly.*

**Recommendation No. 31**

*The Commission recommends that the Access Act and the Private Sector Act be amended to add a provision that would authorize the grouping of citizens for processing of complaints by the Commission.*

**Recommendation No. 32**

*The Commission recommends that the Act respecting occupational health and safety be amended so that it no longer be possible to interpret Sections 174 and 176 of this Act so as to prevent a person from exercising his right to a remedy before the Commission d'accès à l'information to obtain review of a refusal to disclose information furnished by third parties.*

**Recommendation No. 33**

*The Commission should be vested with the power to order the destruction of a personal information file in application of the Private Sector Act.*

*The Commission should be vested with the power to award punitive damages if, at the end of an inquiry, it finds that there has been a violation of the rights respecting protection of personal information recognized by the Access Act or the Private Sector Act.*

**PROTECTION OF PERSONAL INFORMATION IN THE PUBLIC SECTOR**

**Recommendation No. 34**

*Government departments and agencies should apply the principles of protection of personal information in the development of their information system.*

**Recommendation No. 35**

*Government departments and agencies should invite the persons in charge of protection of personal information to participate in the development work on their information system.*

**Recommendation No. 36**

*Government departments and agencies should make information systems designers and architects aware of the principles of protection of personal information.*

**Recommendation No. 37**

*Public bodies should conduct a risk analysis on protection of personal information during the preliminary systems design work.*

**Recommendation No. 38**

*The legal framework of the patient record in the health-care sector should be updated.*

**Recommendation No. 39**

*On the basis of clearly defined objectives and a solid assessment, the development of one or more electronic data interchange models on a local or regional scale would make it possible to build a technological solution favouring a better flow of citizen health information and thus meeting the needs of the stakeholders in the health-care sector.*

**Recommendation No. 40**

*The Commission requests that the concept of separation of data banks held by a public body be clearly recognized in the Access Act.*

**Recommendation No. 41**

*An amendment should be introduced to Section 125 of the Access Act so that the Commission can grant an authorization only if security measures assure the confidentiality of personal information.*

**Recommendation No. 42**

*An amendment should be introduced to Section 125 of the Access Act so that the Commission can request the prior opinion of an ethics committee regarding certain requests.*

**Recommendation No. 43**

*That Section 125 of the Access Act be the sole provision governing requests for access to information by researchers.*

**Recommendation No. 44**

*That Section 125 of the Access Act be amended so that the Commission grants a person or a body authorization to receive communication of nominative information only on the recommendation of the body holding this information.*

**Recommendation No. 45**

*That Section 125 of the Access Act be amended so that the public body that discloses nominative information be responsible for monitoring the conditions set by the Commission, reporting annually to the Commission and providing for the making of a contract between a holding body and a researcher.*

**Recommendation No. 46**

*That the Parliamentary Commission on Culture study the creation of datawarehouses dedicated to research or their networking and assess the expediency of making recommendations regarding legislative amendments intended to provide a framework for this emerging phenomenon, as the case may be.*

**PROTECTION OF PERSONAL INFORMATION IN THE PRIVATE SECTOR**

**Recommendation No. 47**

*The Private Sector Act should provide that a commissioner may exercise alone the powers of inquiry of the Commission d'accès à l'information. Such an amendment should also be made to the Access Act which contains the same deficiency.*

*In a similar vein, a commissioner should be authorized to exercise alone the power related to the exercise of his adjudication function, such as the general powers, the powers regarding applications that are frivolous, made in bad faith or useless, and the powers regarding peremption of applications. Amendments should therefore be made to Sections 141, 130.1 and 146.1 of the Access Act and Sections 55, 57 and 60 of the Private Sector Act.*

**Recommendation No. 48**

*The Commission invites the legislator to remove any ambiguity relating to the field of application of the Private Sector Act.*

**PRIVACY : SOME CURRENT ISSUES**

**Recommendation No. 49**

*The Commission recommends that action be taken on the recommendations formulated by the Conseil de la santé et du bien-être in its report entitled: "Health and Welfare in the Age of Genetic Information: Managing the Individual and Social Issues at Stake."*

**THE COMMISSION D'ACCÈS À L'INFORMATION**

**Recommendation No. 50**

*The Commission therefore recommends that the existing structure be maintained and that it can remain a multifunctional body that combines adjudicative and administrative functions.*

**Recommendation No. 51**

*The Commission recommends that its human, physical and financial resources can be increased so that it can fully perform the mandates assigned to it by the legislator.*

**Recommendation No. 52**

*To respond to the demand and avoid the paralysis that would result from a member's prolonged absence, the Commission recommends an increase in the number of its members.*

**Recommendation No. 53**

*The Commission therefore recommends that measures be taken to ensure that the Commission functionally reports to the National Assembly and that its budget is granted to it by the Office of the National Assembly.*