

**Saskatchewan  
Information and Privacy  
Commissioner**



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Justice Gerald V. La Forest  
P.O. Box 730  
77 Westmorland Street, Suite 600  
Fredricton, New Brunswick  
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Dear Justice La Forest:

I understand that you are currently undertaking a review for the government of Canada focused on whether the Privacy Commissioner and Information Commissioners should be merged into a single entity.

I wish to share some of my observations based on my experience in the access to information and privacy fields over the last 15 years. I enclose a summary of my relevant experience. I was appointed as Saskatchewan's first full-time Information and Privacy Commissioner in November 2003.

I must first express my concern that your review was initiated by Executive Government and not Parliament. I have a concern that this kind of a review will be seen by many Canadians as an attempt by the federal government to minimize challenges to its laws, policies and administration from an officer(s) of Parliament.

The issue before you directly impacts the fundamental rights of citizens to require their government to be as transparent as possible and to have their privacy protected. In provinces where I have worked, the kind of question you are assessing would be seen as a matter for the legislative assembly to consider. The reason why it is so important that Information and Privacy Commissioners both are and appear to be accountable only to the legislature is that the Commissioner must operate independent of the government they oversee. I am frequently in a position of criticizing something a department or government agency has done and challenging them to do better at meeting the purposes of *The Freedom of Information and Protection of Privacy Act*. My office would not likely be credible with the citizens of Saskatchewan if it appeared in any way to be under the control of our provincial government. I would expect that if the Saskatchewan

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government wanted to fundamentally change the mandate of this office or to effect some major reorganization it would ask the Board of Internal Economy or create a Select Special Committee composed of MLA's from both the government and opposition to consider such a proposal. Whatever else you recommend to the Minister of Justice, I respectfully suggest that you also urge the Minister to request that the new Standing Committee on Access to Information, Privacy and Ethics hold public hearings, take steps to facilitate public input and fully consider your recommendations in a transparent fashion.

In my opinion, the integrated access and privacy model evident in all Canadian provinces works well. The provincial freedom of information and protection of privacy statutes reflect two key themes: 1. public records must be accessible and 2. personal information must be protected. My provincial/territorial colleagues across Canada have done a very good job for more than a decade of ensuring that the twin themes both receive appropriate attention.

Would the provincial integrated model work at the federal level?

Although at first glance the proposal may appear attractive and reasonable, I think there are some compelling reasons why combining both offices in a single unit with a single Commissioner would compromise proper and adequate oversight of the federal government.

- 1) There is an important difference in the kinds of activities that provincial commissioners routinely deal with. Foreign affairs, national security, nation-to-nation information sharing arrangements, and governance of large agencies like CSIS and the RCMP are matters uniquely of federal jurisdiction. A list of "key issues" that appears on the Privacy Commissioner's website includes items such as national identity card, advance passenger information/passenger name record, "lawful access" proposals, Public Safety Act, Bill C-36, the Anti-Terrorism Act and the Canadian Firearms Program. My observation is that this represents a major investment of time and resources of the Privacy Commissioner office that is quite unlike the demands on a provincial Commissioner. Provincial commissioners are not normally engaged in studying or providing advice to government on such matters. I think it is unlikely that the current preoccupation with national security and terrorism will diminish significantly in the near term. I think that the challenge posed to the privacy of Canadians is a very substantial one. I have concluded that the challenge cannot be adequately met by a federal Commissioner that must divide his or her attention between privacy protection and fostering improved government transparency.

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- 2) In addition, with the advent of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and its expanded scope to capture most personal information collected, used or disclosed in the private sector, the Privacy Commissioner is now fully involved in regulating a constituency very different than the Information Commissioner. This statute means the Privacy Commissioner is and will continue to be engaged in a host of activities and issues that are qualitatively different than those the public sector presents.
- 3) The Information Commissioner oversees only “government institutions”. There have been a number of recommendations that the scope of the *Access to Information Act* be expanded to capture more Crown agencies and publicly funded entities. Such an expansion would be consistent with the purpose of the Act in terms of ensuring that significant agencies funded with public monies must be transparent and thus, accountable to Canadians. Such an expanded scope will be very difficult to manage without additional resources and capacity for the Information Commissioner office. I think the proposal to merge the two offices will mean even fewer resources and less attention to monitor all of the currently defined government institutions and those that should be added to the list.
- 4) There is an important role for a federal Privacy Commissioner and Information Commissioner to represent Canada at international organizations such as the International Conference of Data Protection and Privacy Commissioners and the International Conference of Information Commissioners. There are all kinds of international working groups that I expect the Privacy Commissioner office to participate in and work with. Provincial/territorial Commissioners may be accredited and participate as “sub-nation” members but that is no substitute for having a federal Commissioner representing all of the nation in such matters. I don’t think it is reasonable to expect that one national Information and Privacy Commissioner would be able to actively participate in such international organizations and fora to cover both access to information and privacy in addition to discharging the full sweep of responsibilities within the nation.
- 5) In my view, the failure to update the *Access to Information Act* and properly resource the office of the Information Commissioner reflects 22 years of Parliamentary inaction. Despite:
  - a unanimous report from the House Justice Committee in 1987 for changes to that Act,
  - a series of Annual Reports from successive Information Commissioners, documenting shortcomings in the statute and the need for amendment, and

- more than 20 private member's bills introduced in Parliament to amend the Act,

the only response I have seen from government has been an "internal" Task Force report in 2002 that did not include in its recommendations any proposal to merge the two offices, and recent promises from the Justice Minister to study the question of statutory amendment further. I suggest that the Parliament could do far more to achieve the purpose of the Act by acting on those long standing recommendations from past and present Information Commissioners than will be achieved by integrating the Information Commissioner in a new Information and Privacy Commissioner office. The result of losing a separate Information Commissioner office may be to just compound the problems already documented with the existing access regime.

- 6) Access to information and the protection of privacy of individuals do not always collide. In my experience the kinds of records that are often sought do not involve any personal information and are more likely to relate to government programs, policies and initiatives. Nonetheless, there are times when an applicant wants for example, details of a public sector employee's compensation package. Provincial/territorial information and privacy commissioners routinely resolve such conflicts between access to information rights and privacy rights in ways that attract little attention and are essentially internal processes. At the national level more public attention ought to attach to such a conflict between access and privacy. With two different commissioners the process of identifying and framing the issues and then developing a solution is more likely to be in the public domain. I think that is a good thing.
- 7) I expect Parliament might choose to design these offices differently if it were today implementing new legislation and creating an oversight office for the first time. That obviously is not the current context. Given that the two offices have existed for more than 20 years, that staff have acquired specialized knowledge and experience in their respective areas and that both offices have earned the respect and confidence of Canadians, what net benefit would result from consolidation? I can see no net benefit to Canadians. Would this save money and if so, how would that occur? Currently both offices have a significant backlog of cases and that seems to be a more or less chronic situation. Other than eliminating one Commissioner position, you will presumably need the same number of staff and indeed should be increasing the number of persons. Even if you create one Information and Privacy Commissioner and eliminate one of the two current Commissioner positions, you will still presumably need a senior person

specifically tasked with overseeing the access to information function and another to oversee the protection of privacy function. The only obvious result to me will be that the government will have one less Officer of Parliament holding it accountable.

- 8) In my experience, the most effective Commissioners are those routinely engaged in a proactive way in consultation with public bodies in ways to build in good access to information and privacy features in the design of new programs and laws. This may entail audits, site visits, review of privacy impact assessments and other non-reactive interventions. My impression is that neither federal office currently has sufficient staff to undertake those kinds of outreach activities. I don't see how merging the two offices would improve that situation.

I hope these comments are helpful to you in your review of the merger question. I would be happy to discuss this topic further with you at your convenience.

Yours truly,

A handwritten signature in black ink, appearing to be 'R. Gary Dickson', written in a cursive style.

R. Gary Dickson, Q.C.  
Saskatchewan Information and Privacy Commissioner

Encl. (1)